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ENVIRONMENTAL ASSESSMENT BOARD



ONTARIO HYDRO DEMAND/SUPPLY PLAN HEARINGS

VOLUME: 119

DATE: Monday, March 9, 1992

BEFORE:

HON. MR. JUSTICE E. SAUNDERS	Chairman
DR. G. CONNELL	Member
MS. G. PATTERSON	Member

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ENVIRONMENTAL ASSESSMENT BOARD
ONTARIO HYDRO DEMAND/SUPPLY PLAN HEARING

IN THE MATTER OF the Environmental Assessment Act,
R.S.O. 1980, c. 140, as amended, and Regulations
thereunder;

AND IN THE MATTER OF an undertaking by Ontario Hydro
consisting of a program in respect of activities
associated with meeting future electricity
requirements in Ontario.

Held on the 5th Floor, 2200
Yonge Street, Toronto, Ontario,
on Monday, the 9th day of March,
1992, commencing at 10:00 a.m.

VOLUME 119

B E F O R E :

THE HON. MR. JUSTICE E. SAUNDERS	Chairman
DR. G. CONNELL	Member
MS. G. PATTERSON	Member

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R. CUYLER		ON HIS OWN BEHALF

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1 ---Upon commencing at 10:00 a.m.

2 THE REGISTRAR: Please come to order.

3 This hearing is now in session. Please be seated.

4 THE CHAIRMAN: This is a continuation of
5 the discussion that was commenced on January the 27th
6 last. As you probably all know, on the 15th of
7 January, the proponent, Ontario Hydro, filed an exhibit
8 numbered 452, which was entitled Demand/Supply Plan
9 Update, 1992.

10 Following the discussion on January the
11 27th, it was decided that the parties needed more time
12 to consider their position and to obtain instructions
13 from their clients, and the discussion was adjourned
14 until today with the understanding that parties would
15 submit their positions in writing before the 28th of
16 February.

17 In the meantime, we have been able to
18 hear the evidence of Ontario Hydro on Panel 8, the
19 fossil panel, and the parties have cross-examined on
20 that panel and that has now been completed.

21 The submissions that we received have a
22 wide spectrum ranging from business as usual to the
23 termination of the hearing, with a great variety of
24 intermediate views.

25 There is some difficulty in cataloguing

1 and characterizing and organizing these views, but some
2 parties have made an attempt to do that.

3 The initial key question appears to be,
4 what is the scope of this particular hearing. Having
5 determined that, what is the effect of that scope on
6 the process of the hearing. And finally, but
7 important, what implications does that have on the
8 funding arrangements that are part of the hearing.

9 We today are here to hear the submissions
10 of the various parties, and at the end of doing so we
11 will be adjourning until Tuesday, March the 24th when
12 Panel 9, the nuclear panel, will commence.

13 The parties in preparation for that
14 should not await our decision. This is analogous to
15 the situation with the fossil panel. Hydro has put
16 before us the evidence that it tends to call and
17 parties should be preparing for the examination of that
18 panel.

19 If the nuclear panel is finished before
20 Thursday, April 16th, we will again adjourn to April 21
21 for the Panel 10 scoping session. Now, we are
22 scheduling that April 21 Panel 10 scoping session to
23 take place even if the nuclear panel is not completed,
24 so parties will have that date set aside to deal with
25 the issues of how Panel 10 and the subsequent Hydro

1 evidence, if any, is to be dealt with.

2 Parties will recall that the date for
3 putting in statements of concerns is April 10. We, on
4 our part, will be endeavouring to get our views, as to
5 the direction this hearing should go, out as soon as
6 possible but, in any event, before April 10, so that
7 parties will be in a position to address Panel 10
8 matters.

9 I would expect there is a possibility
10 that some of the matters which will be discussed today
11 will not be completely fallen - and I am thinking now
12 more of procedural matters rather than substantive
13 ones - and that we will on April 21 have to not only
14 discuss the remainder of Hydro's evidence, but perhaps
15 make some kind of planning of a preliminary nature to
16 reinstitute the presentation of the intervenor cases.

17 As to funding, that is, as I said, an
18 important matter but it is not a matter which I think
19 we ought to be discussing today. We will set aside
20 some time to deal with funding issues, but funding
21 issues, it seems to us, will be much better and more
22 easily addressed once we have the first two issues
23 behind us, that is the scope of the hearing and the
24 process to accomplish that. So we will not deal today
25 with funding.

1 Now, there are 29 parties, I believe,
2 including the proponent, who have put in written
3 submissions. We have all had an opportunity to review
4 them. As I say, there is a very broad spectrum.

5 I am assuming, unless I hear otherwise,
6 that some -- perhaps I should call the role as I
7 usually do.

8 I take it, Mr. Howard, that the proponent
9 will be making submissions, oral submissions? I am
10 talking about oral submissions.

11 MR. HOWARD: Yes, sir, they are very
12 brief.

13 THE CHAIRMAN: Yes. And Mr. Poch?

14 MR. D. POCH: Yes, also brief.

15 THE CHAIRMAN: Anyone else making oral
16 submissions?

17 Mr. Heintzman?

18 Anyone else?

19 Mr. Rosenberg.

20 Yes, all right.

21 Is there anyone who stood up who didn't
22 make a written submission?

23 Yes, sir?

24 MR. ANSHAN: My name is Mark Anshan and I
25 represent CAESCO, an association of energy service

1 companies which is a part-time party to the hearing.
2 It has not appeared before and we may, during the
3 course of this particular hearing, make a short verbal
4 submission.

5 THE CHAIRMAN: Your name is, sir is?

6 MR. ANSHAN: Mark, A-N-S-H-A-N.

7 I would ask to represent CAESCO for the
8 purposes of this hearing.

9 THE CHAIRMAN: Thank you.

10 Yes, sir?

11 DR. BOLDRINI: My name is Boldrini. I
12 would like to make an oral presentation, and I have not
13 presented yet.

14 THE CHAIRMAN: Thank you.

15 Is there anyone who put in a written
16 submission that doesn't intend to make an oral
17 submission?

18 Mr. Thompson, Mr. Rogers.

19 MR. I. WATSON: North Channel Advocates.
20 We will be available for questions but we don't...

21 THE CHAIRMAN: Mr. Campbell?

22 MR. M. CAMPBELL: I don't intend to make
23 any submission.

24 THE CHAIRMAN: Mr. Rogers?

25 MR. ROGERS: Not at the moment, no, Mr.

1 Chairman.

2 MR. McBRIDE: Peter McBride, Ontario
3 Mining Association.

4 THE CHAIRMAN: Yes, thank you.

5 Now, what we have done in the past and
6 what we propose to do today is ask the proponent to
7 make its opening position and then we will call on the
8 parties after that.

9 MR. D. POCH: Mr. Chairman, just before
10 my friend rises, a number of us did have chance to meet
11 briefly and discuss this last week. We have made a
12 suggestion for a categorization which may help the
13 flow. I don't know if the Board is aware of that, if
14 it's agreeable.

15 THE CHAIRMAN: Yes, we are aware of it.

16 What I propose to do, and I won't
17 guarantee because it's very hard to catalogue this, I
18 will call on the proponent to state its position, not
19 perhaps to be responsive particularly to some of the
20 issues that have been raised at this time, and then we
21 will hear from the business as usual group, if I can
22 put it that way, and then move into the people who
23 either have a restricted view of the hearing or think
24 the hearing ought to be terminated completely, and then
25 we will go back up the ladder as we have done in the

1 past.

2 [10:12 a.m.]

3 One thing we will be sure, that anybody
4 who has a point of view will have a chance to express
5 it. We will hope, that as you have all done in the
6 past, that you will try and restrict and restrain
7 yourselves from making repetition.

8 But, basically, we intend to let anybody
9 who is here put their views forward, and then we will
10 try and resolve them.

11 MR. D. POCH: Thank you, Mr. Chairman.

12 THE CHAIRMAN: So the proponent then,
13 first, please.

14 SUBMISSIONS BY MR. HOWARD:

15 Mr. Chairman, I will be brief. We have
16 attempted to analyze the various positions and, indeed,
17 I think came fairly close to your own analysis here
18 because the first issue obviously, as you have said, is
19 the scope of the hearing.

20 We have attempted to set out briefly our
21 position with respect to the nature of the application
22 in four points. But before I deal with those, I would
23 call to the Board's attention what our submission is as
24 to the test which is to be applied to the change before
25 you.

1 It's cited in various ways but it has
2 been referred to the Board before - and this is not in
3 the notes - the Ontario Reports as Re: Coalition of
4 Environmental Groups Concerning Hydro Transmission
5 System. It's reported in 1984 in 46 Ontario Reports
6 Second, at 7.15 and, in particular at page 751.

7 In that case the Joint Board found that
8 there had not been a sufficient change in the hearing.
9 That was reversed on the facts in the Divisional Court
10 in the Court of Appeal, but the test is whether or not
11 the matter before the Board is of an entirely different
12 nature, and while accepting that definition, Divisional
13 Court found that there had, in that case, been such a
14 change.

15 So the four points we would make to the
16 Board with respect to this first issue is: First, the
17 undertaking has not changed; secondly, it is for the
18 proponent to define the undertaking; and, thirdly, with
19 a reference to documents which have been filed from day
20 one, the planning framework always included flexibility
21 and assigned priorities, and nothing has changed in
22 that connection; and, finally, of course, we take the
23 position that until the evidence of the proponent is
24 completed the necessary finding of fact with respect to
25 this issue before the Board would be premature.

1 Now, on the second page of our outline we
2 have referred to the process and submit that there are
3 two decisions to be made, and what tends to be
4 forgotten, in my submission, is that what is before the
5 Board is an environmental assessment, and what is
6 before the Board is the acceptability of the
7 environmental assessment with respect to the
8 undertaking. Secondly, of course, there are the
9 specific approvals to proceed including terms and
10 conditions which the Board may find to be appropriate.

11 Now, some of the submissions to the Board
12 have said there has been a change in the planning
13 framework, and our position is that is simply not so,
14 it is still a 25-year planning framework. Some have
15 attempted to indicate that that has changed to a
16 five-year plan. In our submission, that is not so at
17 all and we refer to, for the definition of the
18 undertaking to Chapter 19, Exhibit 3, page 19-1 - I
19 don't need to turn it up - and to the Update, Exhibit
20 452 at page 32.

21 I would also like to supplement that with
22 a reference to Chapter 18 of Exhibit 3 at page 18-2
23 where the action plan is described. It's clear that
24 there's a 25-year planning horizon and although the
25 five years is not set as five years, if you look at

1 page 18-2 the action plan then being advanced includes
2 the facilities for which an environmental assessment
3 document is expected to be submitted before December
4 31, 1996.

5 And when you read the document that is
6 based upon, the then estimate, that we will be finished
7 here by the 31st of December, 1991, which probably was
8 a little optimistic as it's out not nearly as
9 pessimistic as it should have been.

10 But always the action plan contemplated
11 first establishing the requirement and rationale, and
12 then asking for specific approval of the program which
13 required implementation in the five years succeeding
14 the decision of this Board, and that has not changed.

15 I would like to point out also to the
16 Board that from day one in Exhibit 74 - which is the
17 Demand/Supply Planning Strategy of March, 1989, which
18 was filed at the beginning of these proceedings - the
19 planning strategy which is necessary to establish the
20 requirement and rationale pointed out that there were
21 five priorities, on page 6, very carefully set out the
22 five priorities - and I needn't go through them - but,
23 high priority to maintenance and upgrading of the
24 system, top priority to demand management, high
25 priority to non-utility generation, high priority to

1 orderly development of hydroelectric and, finally, -
2 and this is 5:

3 "Ontario Hydro will keep open the
4 options for major new supply facilities
5 to meet growth and the need to replace
6 old plants and thus ensure a reliable
7 electricity service into the next
8 century.

9 "The major supply options are CANDU
10 nuclear, fossil and firm purchases from
11 Manitoba and Quebec."

12 And then if you go on through the
13 Strategy, at page 16 in Section 2.2, is outlined the
14 Response to Uncertain Growth. From day one it was
15 clear that load forecast is essential in establishing
16 the requirement and rationale and it is pointed out
17 there would be upper and lower projections. And, in
18 particular, 2.2.4:

19 "Preparations for demand and supply
20 options will be undertaken in time to
21 meet the upper load projection while
22 avoiding the cost of premature
23 commitment."

24 Now then, many people have made the
25 submission that has changed, but if one looks further

1 where that is expanded upon, beginning at page 32, it
2 is clear that from day one it was emphasized that
3 uncertainties in load forecast would require
4 flexibility and the development of plans to adapt to a
5 range of forecasts.

6 And, finally, at the bottom of that page
7 33:

8 "The need to identify options to meet
9 the upper load projection must be
10 tempered by the recognition that there is
11 an equal chance that actual loads will be
12 below the median forecast level."

13 So that, in our submission, the Update
14 cannot be characterized as turning the application and
15 the undertaking into one of an entirely different
16 nature.

17 I mentioned earlier the requirement to
18 hear the evidence. In my submission, it is clear that
19 when one looks at Exhibit 452, already Exhibit 452A and
20 452B and Exhibit 467 have been filed providing updated
21 evidence, and before Panel 10 is on the stand, further
22 updates of the material in Exhibit 3 will be provided.

23 So that, in my submission, it is clear
24 that the evidence with respect to the nature of the
25 undertaking and the approvals is not complete and to

1 decide at this stage whether or not the hearing should
2 be terminated would be premature.

3 [10:25 a.m.]

4 I think I need not amplify the remaining
5 points. We have dealt with the numerous submissions
6 with respect to the need to recall witnesses, with
7 respect to various forms of adjournment, and finally
8 funding matters, all of which we say should be
9 postponed.

10 Unless there are any questions, those are
11 my submissions, Mr. Chairman.

12 THE CHAIRMAN: Thank you, Mr. Howard.

13 Mr. Heintzman, I think you are a business
14 as usual person. Would you categorize yourself as
15 that?

16 SUBMISSIONS BY MR. HEINTZMAN:

17 Mr. Chairman, I was perhaps going to be
18 somewhat longer than I may now be in view of Mr.
19 Howard's statement that Ontario Hydro agrees and
20 acknowledges that this remains a 25-year exercise that
21 we are in this morning and in this hearing. And any
22 statements by Hydro's counsel previously to the
23 contrary or that would in any way impact upon that
24 approach, it being the proponent, I take it we are not
25 to have any regard to. So I rely heavily upon Mr.

1 Howard's statement and acknowledgement that this is a
2 25-year exercise that we are involved with and
3 therefore I will not be as long as I thought I would
4 otherwise be.

5 As the submission of AECL states, it is
6 AECL's position that this hearing is into an
7 undertaking which is not the specific facilities set
8 forth in any of the plans shown in Chapter 19 of the
9 DSP.

10 By definition, Hydro is saying in that
11 chapter that there are various plans which are or could
12 be included in the undertaking, and therefore, none of
13 those plans by themselves can be the undertaking. They
14 are methods, Hydro has so stated and it is the
15 proponent, those are methods to facilitate or cause the
16 undertaking to be carried out.

17 The undertaking therefore, in our
18 submission, is what is stated on the first page of
19 Chapter 19, and I said this in our factum, that it is
20 specific Demand/Supply Plan components constituting a
21 program in respect of activities associated with
22 meeting future electricity requirements.

23 Now, the proponent is saying, as I
24 understand it, that there are specific demand/supply
25 components, but what they are is the subject matter of

1 this hearing. They are not the undertaking. The
2 method is the components. And the proponent has said
3 that there are certain proposed components, but they
4 cannot themselves be the undertaking. They are methods
5 for undertaking the undertaking.

6 I think that is a very important
7 distinction because several of the intervenors have
8 fastened on the word "components" and then jumped to
9 the next page and said, those are the components for
10 which Hydro was seeking approval.

11 Now, from one aspect I wish it were so in
12 that Plan 15 with a heavy nuclear component, I could
13 then say that is the undertaking and nothing else can
14 be considered, but I think a fair reading of page 19-1
15 necessarily takes us to the position which we have set
16 forth in our submission.

17 So this Board must define the undertaking
18 in a way that is capable of including all of the plans
19 set forth on page 19-2 and following.

20 The undertaking is therefore a program
21 being a 25-year program which will deliver electricity
22 to customers in Ontario on the basis set forth in the
23 plan; that is, reliably, with cost and environmental
24 considerations as set forth in the DSP.

25 In my respectful submission, a lot of the

1 confusion that is found in the submissions to the Board
2 result from a confusion of the three different concepts
3 which we have all been discussing; that is the
4 undertaking on the one hand, the purpose and rationale
5 for the undertaking which leads up to the undertaking,
6 and the method to carry out the undertaking which is
7 what flows out of the undertaking. If the Board keeps
8 those concepts separate, as I submit they are - and I
9 won't take you through Section 5 as I had intended to
10 in view of my friend's submission - I would submit that
11 those consents are clear and several and separate.

12 My friend I believe has referred you to,
13 and we have, to the decision in Re Joint Board and the
14 Regional Municipality of Ottawa-Carleton, which we have
15 given to you in our materials. The only point that I
16 would like to draw to your attention is that the
17 undertaking as there considered by the Court of Appeal
18 is very similar to that which this Board is being asked
19 to consider. I take it you have our authorities, Mr.
20 Chairman, before you, and if you looked at page 409 of
21 the authority that we have given to you, the
22 undertaking is described by Mr. Justice Zuber, and it
23 is very similar, in my respectful submission, to that
24 before this Board.

25 The Joint Board described its undertaking

1 as a program for the construction of transmission lines
2 and related facilities in order to achieve its purpose
3 of providing for the supply of electric power and
4 energy to meet the load growth forecast which is to
5 occur in Eastern Ontario to the year 2000.

6 Now, if we substitute transmission lines
7 and related facilities to include all of the facilities
8 we are concerned with in this matter, if we substitute
9 Ontario for Eastern Ontario, and 2014 for 2000, the
10 undertaking is very similar to that being advanced by
11 the proponent in this hearing.

12 The Court of Appeal, in a subsequent
13 paragraph, decided that that undertaking was adequately
14 described, and in my submission the description by
15 Ontario Hydro, subject to our agreements on the 25 year
16 planning horizon is similarly adequate, and does not
17 include and is not tied to the specific elements of the
18 plan.

19 We have also referred to you the decision
20 in Energy Probe and the Government of Ontario, which I
21 provided to you at tab No. 3. Again, that was an
22 analysis by the Divisional Court of what constitutes an
23 undertaking, although in that case it was the question
24 of an exception from consideration under the
25 Environmental Assessment Act, the issue is really the

1 same: What is the undertaking that has been exempted
2 as opposed to what is the undertaking that is being
3 approved or not approved in a hearing.

4 The Divisional Court said that you should
5 test that based upon the functions, capacity or
6 character of the undertaking.

7 When you come to the end of this hearing
8 and you consider the Update, you may be required to
9 consider whether the Update can fall within those
10 words, function, character or capacity to the
11 undertaking, but in my submission, and I want to the
12 elaborate on that this morning, if there is frailty
13 attaching to what is before the Board, it attaches to
14 the Update and not to the hearing and the undertaking
15 that is before the Board otherwise than in the Update.

16 If I read all of the submissions, they
17 seem to break down on that basis. Those who seek to
18 narrow the hearing do so on the basis that Plan 15 is
19 the undertaking. And I refer you, and I won't take you
20 to the Consumers' Association submissions, and they do
21 so by faceting or fixing on Plan 15 and saying that is
22 the undertaking, and others who take the same position,
23 in my respectful submission, make the same error.

24 In my respectful submission, Plan 15 is
25 not the undertaking, would that it were, but it is not

1 and therefore the definition of the undertaking must be
2 inclusive of, but not limited to, Plan 15.

3 Now, having said that, what is the impact
4 of the Update.

5 Well, in my submission there is one thing
6 clear, that everybody in this room agrees that there is
7 an undertaking before this tribunal prior to the Update
8 being submitted. I don't hear anybody saying that the
9 Board did not have jurisdiction to consider the DSP
10 prior to the submission of the Update. Nor do I hear
11 Ontario Hydro saying that if the Update is not
12 approved, that the other alternatives still in the DSP,
13 should not be approved.

14 So that we have before us, in my
15 submission, a document which merely provides another
16 way of accomplishing the undertaking, accomplishing the
17 purpose and the rationale.

18 If, as some submit - and I think this is
19 where my client departs from MEA - if there is any
20 problem with what is now happening, the problem
21 attaches to the Update.

22 In my submission, no party to this
23 proceeding can derail the proceeding. Ontario Hydro
24 cannot by submitting a document which purports to
25 change the undertaking, and it says it does not, or

1 purports to do something which some parties may say you
2 cannot do, if the document has that effect, then the
3 document is frail, the document will have no effect.

4 If my respectful submission that may well
5 be the result at the end of this hearing, but that
6 problem attaches to the Update and does not attach to
7 this hearing as it is presently constituted.

8 As we say in our submission, Ontario
9 Hydro will have the obligation to satisfy this tribunal
10 that it has proven the necessary elements in the Update
11 to satisfy the Board that it should be accepted. It
12 will have to do so as to the facts, as to opinion and
13 as to the statutory basis for the Update. And I say
14 that it will be virtually impossible for Ontario Hydro
15 to prove the Update either to the facts or to the
16 opinions or to the statutory basis for it. But that is
17 a submission which, in my respectful submission, should
18 be made at the end of the hearing when everybody's
19 evidence is in and the Board will have an opportunity
20 to consider whether the Update can be justified in all
21 those respects.

22 So I say to MEA, neither it nor Ontario
23 Hydro can and should be permitted to derail the
24 hearing, and the hearing should proceed forward. And
25 those submission which Mr. Mark has most ably made, and

1 which I find a great deal of sympathy, are submissions
2 which go to the validity of the Update and that should
3 be determined in due course.

4 I say that neither the proponent nor the
5 intervenor can derail this hearing. The only way the
6 hearing can be derailed is if the Board itself does
7 some act which takes it outside of its jurisdiction,
8 but neither of the parties either a proponent or an
9 intervenor can do that.

10 So I say the Update cannot of itself
11 derail the hearing, only the Board can could so by from
12 this point on acting in a way that it loses
13 jurisdiction.

14 It is really in respect of that that I
15 want to direct my further submissions because it is my
16 client's interest --

17 THE CHAIRMAN: If I could just stop you
18 for a moment. I want to make sure I understand what it
19 is you are saying.

20 I take it you concede that the proponent
21 can define the undertaking.

22 MR. HEINTZMAN: Yes.

23 THE CHAIRMAN: Can say what the
24 undertaking is.

25 Then are you saying that once having done

1 that, the proponent cannot change the undertaking?

2 MR. HEINTZMAN: The proponent cannot
3 change the undertaking, yes, in my submission.

4 THE CHAIRMAN: And that is what you are
5 saying has happened.

6 MR. HEINTZMAN: I am not saying it has
7 happened.

8 What I am saying is that all that has
9 happened here is that the proponent has proposed
10 another method for accomplishing the undertaking.

11 THE CHAIRMAN: Let's go to - because I
12 think we are going to be spending some time on this
13 anyway - let's go to page 19-1 of the DSP where there
14 is a definition of the undertaking, and in language
15 there is no difference that I detected in how the
16 undertaking is described in either of those two
17 paragraphs at the bottom of right-hand column of page
18 19-1 and in 452, they use precisely the same language.
19 But what has changed is the program, because the
20 program submitted for approval is not the same program
21 submitted for approval as in the DSP.

22 Am I right so far?

23 [10:38 a.m.]

24 MR. HEINTZMAN: Well, again, it depends
25 how you define the program. If the program is

1 activities associated with meeting future electricity
2 requirements in Ontario, if that is the definition of
3 the program, then the specific plans are methods to
4 accomplish that program.

5 THE CHAIRMAN: Well, I think you have to
6 read the second paragraph of 19-1. It says:

7 "The program submitted for approval
8 represents only a part of the results
9 of integrated planning which led to the
10 identification of candidate demand/supply
11 plans. The plan components not included
12 in the program either do not require
13 approval or are not being submitted for
14 approval in this application."

15 So I take it the program is now the
16 approvals being sought.

17 MR. HEINTZMAN: Well, Mr. Chairman, you
18 should perhaps direct these questions to Mr. Howard.
19 As I understood what he is saying --

20 THE CHAIRMAN: That's what I thought he
21 said.

22 MR. HOWARD: That's what I said.

23 THE CHAIRMAN: That's what I thought he
24 said, I may be wrong.

25 MR. HOWARD: That's what I said.

1 MR. HEINTZMAN: Well, in my respectful
2 submission, the undertaking can only be something that
3 includes the Update and all of the plans shown on the
4 following pages.

5 THE CHAIRMAN: Well, that trenches in on
6 the first proposition that I put to you is that the
7 proponent defines the undertaking.

8 MR. HEINTZMAN: Yes.

9 THE CHAIRMAN: The proponent says, this
10 is the undertaking. You can't quarrel with that. What
11 you can quarrel with is whether, having launched a
12 defined undertaking, they can then change it. The
13 statute doesn't seem to specifically contemplate that.

14 MR. HEINTZMAN: Well, what I see the
15 undertaking is -- I can quarrel with Mr. Howard in what
16 he has defined as the undertaking, if we have a
17 quarrel. I don't believe we have a quarrel.

18 The undertaking, in my submission, is
19 defined in the first paragraph. The program that is
20 then set forth is a method of accomplishing the
21 undertaking; that is, activities in respect of meeting
22 future electricity requirements in Ontario.

23 Now, if the program submitted for
24 approval is Plan 15, and if that is the undertaking,
25 then clearly there is a fallacy in the document itself

1 because the proponent has said that there are other
2 programs, there are other plans which will accomplish
3 the undertaking.

4 It is said in this document, it is
5 satisfied with; in other words, Ontario Hydro has said
6 we are satisfied if this Board approves Supply Plan 22.
7 It has different components in it, but they
8 specifically say in here that Plan 22, if we look at
9 page 19-3, is one alternative method of carrying out
10 the undertaking.

11 So the undertaking cannot be, as I read
12 the document, the facilities set forth on page 19-2.

13 THE CHAIRMAN: I probably should have
14 addressed to this to Mr. Howard, if I had thought of it
15 I would have, but there is now no Plan 15, as such,
16 being put forward by Hydro, Hydro is putting forward a
17 different kind of plan.

18 MR. HEINTZMAN: With respect, no.

19 THE CHAIRMAN: With respect --

20 MR. HEINTZMAN: Plan 15 --

21 THE CHAIRMAN: For example, there is no
22 specific characterization of major supply, it may be
23 fossil, it may be nuclear, it may be alternative
24 energy, it may be a mixture.

25 MR. HEINTZMAN: But I have not heard

1 Ontario Hydro say, Mr. Chairman, that if you do not
2 approve the Update that it does not want you to approve
3 Plan 15. It has not said that. It has not withdrawn
4 Plan 15, Plan 22, Plan 24 or any of these plans before
5 the Board.

6 If this Board decides not to approve the
7 Update, it surely has the other alternative methods
8 available to it and, as I understand Ontario Hydro's
9 position, it is that these are different methods for
10 accomplishing the undertaking and, by definition, I say
11 that Plan 15 cannot be the undertaking otherwise
12 Chapter 19 just doesn't make any sense.

13 So I say that Ontario Hydro can define
14 the undertaking, but it has, it has in that first
15 sentence and it is an undertaking which includes the
16 possibility of doing it by virtue or by way of Plan 15.
17 It now includes the possibility of doing it by virtue
18 or by way of the Update.

19 So I say that the only problem that we
20 have is to make sure that the Board from here on in
21 does not lose jurisdiction, because I say the Update
22 itself cannot cause that and what I have asked and what
23 AECL has asked in its submissions is that the Board
24 make certain declarations to ensure that the train is
25 still on the track during the balance of the hearing.

1 And let me speak to the first matter;
2 and, that is -- and I deal with this in paragraph 13 of
3 the Factum.

4 The first thing that the Board should do
5 is ensure that this remains a 25-year planning
6 exercise. I say that fact, that criteria is a
7 fundamental element of Exhibit 3 and of the approvals
8 being sought by Ontario Hydro of everything. You just
9 cannot have a plan without a planning period, you
10 cannot have a program without a period, and so I say in
11 the first two parts of paragraph 13, 13A and 13B, that
12 the Update cannot convert the program or the plan into
13 something other than a 25-year plan.

14 I think we were concerned about that
15 matter as a result of certain comments made when this
16 document was first discussed before the Board, and I
17 take it from what Mr. Howard has said this morning that
18 I can rest assured that the process that we are
19 involved in has not changed in respect of the planning
20 horizon, and that when you come to the end you will
21 have to approve or not approve a plan based upon
22 whether it adequately addresses a 25-year planning
23 horizon. If it doesn't, then it can't be approved; if
24 it does, then it can be approved.

25 Now, I was going to give to you and read

1 to you at length from the DSP and I have given to the
2 registrar a document where I have set out the various
3 references to this being a 25-year plan.

4 And has the registrar given that --

5 THE REGISTRAR: Not yet. Is it going to
6 be made an exhibit.

7 MR. HEINTZMAN: I don't require it to be
8 made an exhibit. It's part of the argument.

9 THE CHAIRMAN: Well, to be consistent we
10 will mark it as an exhibit.

11 THE REGISTRAR: That will be No. 516, Mr.
12 Chairman.

13 THE CHAIRMAN: We have marked a number of
14 things that don't, by the wildest stretch of the
15 imagination constitute evidence, but we will. It helps
16 to identify it.

17 ---EXHIBIT NO. 516: List of references in Exhibit
18 No. 3, re 25-year plan.

19 MR. HEINTZMAN: I won't take you any
20 further than the first reference, and actually there's
21 one prior to the first reference, if I could just draw
22 your attention to the Table of Contents in the DSP,
23 which is a flip-out exercise, it says that the purpose
24 of the Demand/Supply Plan is to identify actions needed
25 to serve the future electricity needs of the people of

1 Ontario over the next 25 years and beyond.

2 Perhaps I should just take you to a few
3 of these references because it becomes apparent that
4 throughout Ontario Hydro is talking of a 25-year plan
5 in everything, the costing, the environmental
6 considerations, the demand, everything is tested
7 against a 25-year plan.

8 I think it's fair to say that many, if
9 not most of those in this room, would not have engaged
10 in this exercise if they did not believe that while, of
11 course, Ontario Hydro can come back for further
12 approvals in future years, that the present exercise
13 was dedicated towards looking at a 25-year time horizon
14 and providing approvals which satisfied appropriate
15 planning considerations based upon that time horizon.

16 Now, on page 1-7 of the DSP describes how
17 the plan was developed, and about line 25 says:

18 "The work to develop a long-term
19 Demand/Supply Plan focused on identifying
20 a 25-year proposed plan and an associated
21 shorter term action plan which best
22 reflect the planning strategy."

23 And the statement of a 25-year plan, a
24 25-year horizon, a 25-year planning period is replete
25 and is the fundamental basis of the document.

1 The action plan does not drive the
2 planning period, the planning period drives the action
3 plan, and that will become of absolute and fundamental
4 importance to this Board at the conclusion of this
5 hearing and I say so, respectfully, particularly with
6 respect to whether this Board approves the Update.

7 And, in my respectful submission, this
8 Board should now make it clear that this is a 25-year
9 planning horizon. That's very much a matter that some
10 other parties contest, and I refer you to the statement
11 set forth in the Coalition of Environmental Groups in
12 their factum - I won't read you it - but at pages 2 and
13 3 the Coalition states that:

14 "The time horizon is by virtue of the
15 Update now a shorter planning horizon."

16 And AECL categorically rejects that
17 approach. I say, if that is in fact the case, then on
18 that ground alone the Update will not be approved at
19 the end of the hearing.

20 And I say that it is not possible for
21 intervenors to conduct the case, and let alone Hydro,
22 conduct a case unless we all understand that, yes, this
23 is still a 25-year planning exercise, we will
24 cross-examine against that 25-year time horizon, we
25 will lead evidence against that 25-year time horizon.

1 That is the fundamental element in this proceeding.

2 In paragraph 13C I raise a further
3 consideration which, again, I submit will be a
4 consideration to the Board at the conclusion of this
5 hearing; and, namely, whether from a planning
6 consideration the Update should be approved having
7 regard to the fact that it purports to plan to the
8 median.

9 If this Board determines that for
10 planning considerations, environmental considerations
11 and other considerations planning to the median is not
12 an appropriate plan for this Board to proceed on, I'll
13 leave aside Hydro's internal management, but for this
14 Board to proceed on, then it will reject the Update.

15 So I will be submitting at the end that
16 this Board should plan to the upper, and if I convince
17 this Board of that then, in my submission, the Board
18 will reject the Update.

19 Finally, I say in paragraph 13D that
20 nothing in the Update will or does preclude Hydro from
21 meeting the statutory requirements for the Update.

22 Now, as Mr. Mark and others have
23 submitted, it will be very difficult for Ontario Hydro
24 to satisfy those criteria with respect to the Update,
25 but whether it can or whether it will is for Mr. Howard

1 and his confreres to seek to do during the balance of
2 this hearing.

3 I have pointed out in part B of the
4 factum that it is perfectly open for the Board to
5 approve another method than that set forth in the
6 Update to carry out the undertaking.

7 As I've already said, one of those
8 methods could be one of the original methods proposed
9 by Hydro. That is an alternative identified by Hydro,
10 and the decision of the Divisional Court in the Joint
11 Board decision at Tab 2 of my authorities specifically
12 says that this Board has jurisdiction to approve
13 another alternative identified by Hydro that is not its
14 now preferred alternative.

15 [10:55 a.m.]

16 So, for that reason alone, since Hydro
17 identified that alternative, this Board remains seized
18 of the matter and has jurisdiction to approve Plan 15
19 or some component or element thereof.

20 I also say that the Board can approve
21 major new supply by virtue of submissions made by an
22 intervenor such as AECL or any other intervenor. And
23 that is clear also from a decision specifically dealt
24 with by the Divisional Court in the Joint Board
25 decision, that an alternative proposed by an intervenor

1 to the method described by Hydro can be approved by
2 this Board. So on both grounds, both that Ontario
3 Hydro has identified major new supply in its original
4 submissions, and by virtue of intervenors, this Board
5 has authority to approve a major new supply and to make
6 any approval that it grants conditional upon that
7 approval of that new supply.

8 I say that the Board may get to that
9 result through many and various ways. It may reject
10 Hydro's latest demand scenarios, it may reject planning
11 to the median. It may do many, many things. It may
12 come to many conclusions to arrive at the view that
13 major new supply should be an element of the Board's
14 approval, but it's not for us now to speculate as to
15 how the Board might arrive at that conclusion.

16 Now, some of the intervenors have taken
17 issue with that point and said that Hydro cannot now
18 propose major new supply and nor can an intervenor, and
19 that position appears to arise from the submissions of
20 Energy Probe and Northwatch. And again, I won't take
21 you through those submissions as I was going to in view
22 of Mr. Howard's submission or position before you, but
23 in my submission, neither Ontario Hydro nor an
24 intervenor can preclude this Board from examining major
25 new supply. Ontario Hydro can't because it can't

1 change the undertaking and it can't take off the table
2 and hasn't purported to take off the table some of the
3 options that were on the table before the submission of
4 the Update, nor can any intervenor take another method
5 of accomplishing the undertaking off the table.

6 As to the procedural orders that should
7 be granted, Mr. Chairman and Members of the Board, we
8 have submitted that there should be some period in
9 which to digest what Ontario Hydro is proposing. Now I
10 am not so concerned, although I have stated in my
11 factum about Panel 9, I presume that Ontario Hydro will
12 proceed with Panel 9 on the basis of the present DSP
13 and set forth its position in a similar fashion to that
14 which it did with respect to the fossil alternative,
15 but I am extremely concerned about Panel 10. Virtually
16 we have no basis for understanding how Ontario Hydro
17 got to the Update. We just don't have any planning
18 documents, maybe there are none. We have no planning
19 considerations, and again maybe there are none. If
20 there are none, as I have already submitted, the
21 proponent will have a very difficult time convincing
22 this Board to accept an update which has come out of
23 the blue, as it were.

24 But what we need to know, in view of the
25 fact, as I understand it, the proponent is suggesting

1 that Panel 10 sort of be a mini-hearing of the whole
2 thing, we need to know now what Ontario Hydro's
3 position is. We need all of their planning documents
4 and we need to have their evidence in what I will call
5 canned form now so that we can completely understand
6 where Hydro is going. I respectfully submit that that
7 is not too much to ask.

8 We should have, as I said when we
9 discussed this matter beforehand, Hydro's complete
10 information and we should have their complete evidence
11 that they propose to give in Panel 10 before we are
12 required to embark upon an exercise that really now is,
13 so far as I am concerned, completely up in the air, and
14 we have no idea of the planning considerations that
15 went into the Update.

16 We should have those now and if we don't
17 get them now then we should have some period of time
18 which in my submission would have to be at least four
19 weeks to digest all the material that either must lie
20 behind the Update, or if it doesn't, the Update will be
21 in difficult shape.

22 If we get the statements of the witnesses
23 that demonstrate there is nothing behind the Update,
24 then fine, we can deal with it, I think, within four
25 weeks on that basis. If there is anything behind the

1 Update in terms of planning documents and
2 considerations, then I will be back here submitting
3 that we will need further time to analyze and digest
4 those materials.

5 Those are my submissions.

6 THE CHAIRMAN: Mr. Rodger?

7 MR. RODGER: Thank you, Mr. Chairman.

8 SUBMISSIONS BY MR. RODGER:

9 Mr. Heintzman covered many of the issues
10 and AMPCO supports his general conclusions. We come to
11 those conclusions in somewhat of a different manner,
12 and I would just like to briefly take you through some
13 of the different spins on AMPCO's argument.

14 We agree that while the undertaking
15 itself has not changed, that this hearing is still
16 about essentially meeting the province's future
17 electricity requirements until the year 2014, we see
18 the undertaking itself being comprised of two essential
19 elements, and it is on those elements that the Board
20 must make findings.

21 I think, Mr. Chairman, you referred to
22 what is, in essence, AMPCO's position when you were
23 addressing Mr. Heintzman. We see the undertaking as
24 being comprised of a program and of also specific
25 demand and supply components.

1 Now, when I refer to program, AMPCO
2 submits that that means methods of planning strategy,
3 planning philosophy, whereas the demand/supply
4 components are the individual aspects of Hydro's plan,
5 the individual demand and supply components of the
6 Update, the individual demand and supply components of
7 Plan 15, Plan 22, and so forth.

8 I was quite pleased to see in Ontario
9 Hydro's brief submission where it sets out its view of
10 its undertaking and plan. In paragraph 2 under the
11 heading of the Nature of the Application, it states:

12 Issues associated with the
13 acceptability of the environmental
14 assessment include whether Ontario
15 Hydro's 25-year planning framework
16 provides an appropriate basis for
17 decision-making.

18 It moves on to paragraph 3:

19 Having considered the appropriate
20 planning framework, the panel would then
21 deal with the issues relevant to the
22 actual planning results and approval to
23 proceed with the undertaking.

24 So, AMPCO submits that what this hearing
25 is about is planning, it's a planning hearing. The

1 Board must address its mind to whether Hydro's planning
2 philosophy, whether the strategies they put forth which
3 underpin the specific plans, the Update, Plan 15, et
4 cetera, whether both those things are appropriate in
5 the context of a 25-year plan.

6 Now, to date there are two programs or
7 two planning strategies before the Board. For seven
8 years, up to the point in time when it was introduced
9 to the public, the Demand/Supply Plan was based on the
10 planning strategy of planning to the upper load
11 forecast and then building to the actual load forecast.
12 That is throughout the many years of the planning that
13 lead up to this hearing.

14 Then this past January we have a new
15 program, and that program or planning philosophy is
16 planning around the median.

17 AMPCO submits that the Board cannot
18 approve a program or cannot approve the demand/supply
19 components without approving that underlying strategy,
20 the underlying philosophy. In that respect, the Update
21 doesn't do anything to change the hearing or change the
22 undertaking. The Update is merely one alternative
23 method of carrying out that undertaking. It's up to
24 the Board to decide whether that's appropriate for a
25 long-term plan or whether, as AMPCO will argue, that

1 the former planning philosophy of planning to the
2 upper, that that is the more appropriate strategy in a
3 long-term planning context.

4 Now, up to this point in time the
5 individual parties really haven't had much opportunity
6 to describe what their concerns about what the pith and
7 substance of what this hearing is about, but they did
8 have one opportunity, and that was the opening day of
9 this hearing last April. While I don't want to spend a
10 great deal of time on this, it does indicate what the
11 parties thought this hearing was about.

12 There are some parties today that are
13 saying that this hearing is a very narrow, 5-year
14 planning horizon, but that wasn't the case back in
15 April.

16 Just to give you a couple of examples,
17 back in Volume 1 on page 45, in the Moose River/James
18 Bay Coalition, in their opening statement, they talk
19 about the evidence that they planned to lead at this
20 hearing, and that evidence went to the effect that they
21 were going to show that in fact the need date could be
22 pushed back right to 2015, that with further research
23 and development on energy efficiency, on alternative
24 energy options, they could push Hydro's need back to
25 the end of the planning horizon. Certainly that

1 intervenor was looking at this hearing as long-term
2 planning context.

3 Pollution Probe similarly at page 231 of
4 Volume 2 said and I quote:

5 This hearing is about a vision. It is
6 convened to examine Ontario Hydro's
7 vision of the long term future of
8 Ontario.

9 Certainly not a 5-year planning horizon,
10 I submit, but a long-term plan.

11 The Coalition of environmental groups as
12 well in Volume 2, page 214:

13 But this hearing isn't about one
14 generating plant or a transmission line.
15 This is a 25-year plan which will
16 encourage a whole style and form of
17 energy system development.

18 And AMPCO would agree with that
19 interpretation. That's what this hearing is about.

20 Finally, IPPSO, again in Volume 2, page
21 245 from line 5 five onwards stated, and I quote:

22 Those who will be participating in
23 the public debate in review of a plan are
24 not the people who will be most affected
25 by it. We are making a decision over the

1 next three years that will in large
2 measure dictate how our children live.
3 We could, if we make the wrong choices,
4 saddle them with the burdens of enormous
5 debt, costly power and worst of all,
6 escalating environmental catastrophe. At
7 the other extreme we could hand to them
8 an economy so crippled by the lack of
9 necessary electricity that it cannot
10 complete in the global marketplace.

11 Mr. Chairman, this hearing wasn't about a
12 few formal approvals for a new range of hydraulic and a
13 few new transmission lines. This hearing was about
14 providing a decision which would constitute the
15 planning framework, the planning blueprint by which
16 Ontario Hydro selects the demand and supply
17 alternatives to the end of the planning context, that
18 is to 2014.

19 Now, I want to put forth to you one
20 alternative position. As said in our written
21 submissions we go in some detail as to what we feel the
22 nature of this hearing is about. But should you find
23 that this hearing is only about a 5-year plan, that the
24 planning horizon doesn't extend past that time, then
25 AMPCO submits then the undertaking has in fact changed

1 and we have a different undertaking than we did last
2 April, and in that case we would support the MEA's
3 argument that the hearing come to an end if you find
4 that argument persuasive.

5 In summary, Mr. Chairman, the essential
6 points that AMPCO seeks clear direction on is that the
7 undertaking remains one in respect of activities
8 associated with meeting Ontario Hydro's electricity
9 requirements to 2014; that any approvals that this
10 Board gives are premised on that 25-year planning
11 horizon; that the Update is merely one alternative
12 method of carrying out the undertaking pursuant to
13 Section 5(3) of the Act; that the Board will receive
14 evidence and hear argument with respect to planning
15 strategies or programs other than the ones underpinning
16 the Update, and the Board will not make the final
17 decision as to which program and demand supply
18 components are appropriate until all the evidence has
19 been lead by both the proponent and by all the
20 intervenors. And that since this is a planning
21 hearing, that it is also open to this Board to make
22 requirement and rationale findings on major new supply
23 options. And the reason why that decision is
24 important, is that it is entirely consistent with
25 Hydro's position since this hearing began, is that in

1 the future when it gets to site specific hearings then
2 we won't have to revisit those planning issues on major
3 supply.

4 If the Board finds that major supply is
5 an acceptable option for Ontario Hydro to plan on and
6 rely on in the future, then those issues should be
7 dealt with now and the Board should decide on those
8 issues now so in the future they won't have to be
9 revisited.

10 Further, that the Board may approve a
11 plan which is different from the Update and may approve
12 a plan which includes a new major supply facility.

13 And finally, AMPCO got involved in this
14 process relying on the original DSP document that was
15 filed. Since we now have a new program and new demand
16 supply components, it puts us in the position of
17 presenting to you an alternative method of carrying out
18 the undertaking, that's a task that was far greater
19 than what we had anticipated and we would be seeking
20 intervenor funding or interim costs to help cover those
21 expenses, and as you instructed, we will deal with of
22 with questions another day.

23 Subject to any questions, those are my
24 submissions, Mr. Chairman.

25 DR. CONNELL: Mr. Rodger, I wonder if in

1 your reviewing the submissions of other parties if you
2 looked at particularly the submission from the
3 Coalition on page 3, paragraph 10, which deals with two
4 of the matters that you have raised. This is under tab
5 6.

6 MR. RODGER: Page 3?

7 DR. CONNELL: Page 3.

8 MR. RODGER: That was paragraph 10?

9 DR. CONNELL: Yes.

10 MR. RODGER: Yes, we would disagree with
11 that position, because as I said, AMPCO always felt
12 that this hearing dealt with requirement and rationale
13 issues. While Hydro may put forth that the need for an
14 option beyond, let's say, the 2006 date is not needed
15 now, but those planning principles should be reviewed
16 at this hearing, either to reject it or that Hydro
17 could include those options in its long-term planning
18 Since the time line of this hearing is to 2014.

19 It was AMPCO's understanding that was the
20 whole purpose this hearing, to avoid duplication, to
21 avoid the repetition of the issues at future hearings.
22 That this Panel's decision would set out the guidelines
23 which Hydro could look to and all the interested
24 parties in the province could look to, but what was
25 acceptable and what was not acceptable, and therefore

1 all those options are in.

2 DR. CONNELL: Thank you.

3 MR. RODGER: Thank you, Mr. Chairman.

4 THE CHAIRMAN: Is there anyone here from
5 Dofasco?

6 MR. HUNTER: Mr. Chairman, my name is
7 David Hunter. My comments will be substantially
8 shortened on the basis of comments made by Mr.
9 Heintzman and Mr. Rodger, as well as my understanding
10 of comments made for Ontario Hydro.

11 SUBMISSIONS BY MR. HUNTER:

12 With respect to the first issue, I should
13 first of all point out, there is a document which has
14 been prepared, I presume, by a group of intervenors
15 which identifies Dofasco as seeking the termination of
16 this hearing. That is not a correct understanding of
17 our position. So I would suggest that that submission
18 by that group not be accepted by the Board.

19 As you are aware, Dofasco Incorporated is
20 a steel company and is a major consumer of electricity
21 in this province.

22 The clear understanding that we have and
23 had of the hearing and as I understand it is now
24 reinforced by comments by Ontario Hydro's counsel, is
25 that firstly we are looking to a planning period of 25

1 years. We assume that approvals will be based upon
2 that 25-year planning period by this Board, and that
3 the 25-year planning forecast will be part of the
4 planning rationale.

5 [11:13 a.m.]

6 We suggest to this Board that the
7 planning rationale used by Ontario Hydro is part of the
8 undertaking and is part of the evidence to be tested
9 before this Board.

10 And, in that regard, if I might refer the
11 Board to the comments of Mr. Jeffery as he then was
12 with respect to the Timber Class hearing, that matter
13 was with respect to a Class Assessment on Timber
14 Management, but in that hearing the issue of the
15 breadth of the undertaking was put to him, and although
16 this may not provide any solace to you, sir, I would
17 quote:

18 "Suffice it to say, there was my no
19 means unanimity of view among counsel for
20 the various parties as to what properly
21 constitutes an undertaking involving the
22 concept...", in this instance, "...of a
23 Class Environmental Assessment."

24 I don't believe thematically, legally or
25 conceptually or even technically that the nature of the

1 hearing before you precludes or doesn't address the
2 same concerns. In other words, even though the ruling
3 in this matter was with respect to a Class Assessment,
4 I think the same rulings ought to apply in this regard.

5 And the ruling itself holds that the
6 planning rationale for the Timber Class Hearing was
7 part and parcel of the undertaking. I have relied upon
8 that ruling and the understanding therein.

9 It is also my understanding that Ontario
10 Hydro has led substantial planning rationale evidence
11 with respect to this hearing and my submission to you
12 that, in part, the planning process -- sorry, the
13 forecasting requirements or forecasting statements and
14 rationale constitute part of that planning process.

15 Mr. Heintzman has addressed the issue of
16 planning to the median, planning to the upper, and I
17 will not comment on that except to echo his comments
18 and suggest that this too will be a matter that Dofasco
19 will be addressing.

20 With respect to the scope of the
21 undertaking, I adopt the comments presented to you by
22 Mr. Heintzman and Mr. Rodger. In my view, the
23 undertaking comprises, firstly, the original plan as
24 proposed by Ontario Hydro; secondly, the Update which
25 is no more and no less than an alternative; and a new

1 alternative as presented by Ontario Hydro which now
2 constitutes the activity, but that
3 alternative/activity/undertaking has to be compared to
4 all others that have been prepared by Ontario Hydro
5 and, indeed, to any other options or alternatives that
6 may be presented by any other intervenor.

7 We are of the view that Hydro has simply
8 presented one mix and that it is up to the intervenors
9 before this Board to challenge that particular mix and
10 then to seek to persuade the Board to adopt any other
11 mix.

12 The last comment I would make is - and
13 again I'm simply focusing on comments made by Mr.
14 Heintzman - we do not have any basis of information to
15 determine the adequacy of Hydro's assertion that demand
16 management and fuel switching will provide a
17 substantial component to meet Ontario's electrical
18 needs until the year 2014.

19 And we submit to this Board that those
20 matters have to be submitted before this panel, and I
21 would submit to you that the evidence that was
22 presented in Panel 4, which in my view simply went to
23 the statement that there may be changes in those
24 forecasts, is not sufficient to cover Ontario Hydro off
25 from the necessity to prevent sufficient planning

1 rationale to this Board.

2 Those are my submissions, if you have any
3 questions.

4 THE CHAIRMAN: Thank you, Mr. Hunter.

5 MR. HUNTER: Thank you.

6 THE CHAIRMAN: Anyone here from
7 Falconbridge? Ontario Mining Association? Electrical
8 and Electronic Manufacturers Association?

9 SUBMISSIONS BY MR. McELWAIN:

10 Mr. Chairman, Members of the Board, John
11 McElwain appearing for the Electrical and Electronic
12 Manufacturers Association of Canada.

13 The Association fully endorses the
14 positions and submissions ably put forward by Mr.
15 Heintzman and Mr. Rodger.

16 Thank you.

17 THE CHAIRMAN: Canadian Nuclear
18 Association?

19 SUBMISSIONS BY MR. BULLOCK:

20 Yes, sir.

21 Sir, my name is Lex Bullock and I appear
22 for CNA.

23 CNA's submission is before you, written
24 submission is before you, Mr. Chairman, and Harry
25 Truman used to say "Show me", and if we haven't shown

1 you already in our written submission, I hope to be
2 able to show you this morning why the Update is simply
3 an alternative method of carrying out the undertaking.

4 CNA finds itself again in substantial
5 agreement with Messrs. Heintzman and Rodger, and I
6 found Mr. Hunter's comments, sir, very interesting and
7 I think very succinct and; that is, that's it up to the
8 intervenors to argue for other mixes, and I think that
9 that's absolutely correct and I think that Mr. Hunter's
10 analogy in that respect is an appropriate one.

11 The focus of my submission, sir, Members
12 of Board, is on the Ottawa-Carleton decision and the
13 powers of this Board, and I would submit to you, Mr.
14 Chairman, and Members of the Board, that that is where
15 the focus ought to be. The focus ought not, in my
16 respectful submission, to be on how the word program is
17 used or how the word plan is used - and I have some
18 submissions on that - but that ought not to be where
19 the focus is, the focus, sir, ought to be on the powers
20 of the Board as set out in the Ottawa-Carleton
21 decision, and let us not forget, Mr. Chairman, that the
22 Divisional Court in this province has already
23 considered the scope of this particular hearing and we
24 can find some very helpful comments in the MEA
25 application decision and I have cited those in CNA's

1 submissions, sir.

2 To deal with Dr. Connell's question
3 dealing with the Coalition's submission - and I hope I
4 have it right - submissions of the Coalition of
5 Environmental Groups on the nature and undertaking and
6 scope of the hearing page 3, paragraph 10. They say,
7 sir, in that paragraph:

8 "We urge the Board to limit its
9 considerations to those matters that are
10 alternatives to or alternative methods
11 for carrying out the undertaking."

12 I think that distinction, sir, is
13 critical, absolutely critical to this Board's
14 decision-making process. If a particular program or
15 plan is an alternative to the undertaking, then it is
16 not within this Board's power to approve that; if it's
17 an alternative method, then it is within the Board's
18 power to approve that.

19 And, yes, the Court of Appeal in this
20 province has had some difficulty dealing with the
21 Environmental Assessment Act, it's a very difficult Act
22 and they have had, I would suggest, perhaps some
23 difficulty dealing with the DSP, Exhibit 3. It's a
24 very difficult document to understand.

25 But the bottom line is, and the

1 Ottawa-Carleton decision is authority for this
2 proposition, the bottom line is, sir, that -- my
3 proposition is this, is that Ontario Hydro has not and
4 cannot define the undertaking in a manner that permits
5 changes in the demand or supply components that this
6 Board cannot amend or alter or substitute.

7 In other words, we shouldn't be coming at
8 it from the approach of is it a program, are the
9 components in are the components out, that's the issue,
10 the issue is the powers of this Board, sir. And my
11 submission to you is that they have not defined the
12 undertaking in a way that would restrict the Board's
13 powers to change the mix and cannot do that.

14 So to deal with that, sir, that is I
15 think absolutely critical, that distinction in the
16 Coalition's update in paragraph 10.

17 And my submission to you, as I said, is
18 that --

19 THE CHAIRMAN: I'm not sure I quite
20 follow that, and perhaps I didn't hear it correctly.

21 Did you say that if they are not asking
22 for approvals we can approve it in any other way than
23 an alternative method to carry out the undertaking?

24 MR. BULLOCK: No, sir.

25 THE CHAIRMAN: Just a moment. I thought

1 it was clear that the court decided that we could not
2 approve alternatives to the undertaking.

3 MR. BULLOCK: That's what I said, sir.

4 THE CHAIRMAN: Yes.

5 MR. BULLOCK: And what I'm suggesting to
6 you, sir, is that Ontario Hydro has not defined this
7 undertaking in a way that in any way restricts the
8 Board's dealing with substituting various components.

9 In other words, the mix is before this
10 Board, and the reason that is the case, sir, is that
11 they are alternative methods, and I think that it's
12 important, sir, as you point out, it can get very
13 confusing to talk about alternatives to and alternative
14 methods.

15 CNA's submission to you is that the
16 Update plan, the program associated with the Update
17 plan, to repeat the language used in Chapter 19, is an
18 alternative method of carrying out the undertaking.
19 That is our essential submission to you.

20 THE CHAIRMAN: Well, I fall back on page
21 19-1 and the definition of the undertaking, and it's
22 not the clearest crystal language that you could get.

23 MR. BULLOCK: It's very difficult to
24 understand.

25 THE CHAIRMAN: It starts off by saying

1 that:

2 "The undertaking as described is
3 made up of specific Demand/Supply Plan
4 components...", and that, I take it are
5 things like demand management, hydraulic, nuclear,
6 whatever, in fact the components are listed in the
7 executive summary:

8 "...and constitutes a program in
9 respect of activities associated with
10 meeting future electricity requirements."
11 It goes on to say:

12 "The program submitted for approval
13 represents only a part of the results of
14 the integrated planning which led to the
15 identification of candidate demand/supply
16 plans. The plan components not included
17 in the program either do not require
18 approval or are not being submitted for
19 approval in this application."

20 Now, having gone through all that, I
21 think you are saying that we could approve something
22 that wasn't part of the program and the program at the
23 moment with the Update is transmission from Manitoba,
24 radial transmission for hydraulic, some hydraulic, and
25 that's it.

1 MR. BULLOCK: Yes, sir, but the program
2 is the conclusion, it's the sum if you will, sir, to
3 the equation. If the equation is X plus Y plus Z, the
4 approvals that are sought is the sum of the equation
5 and the equation, sir, is the method of getting at the
6 undertaking which is, I think, the question of
7 supplying the needs of electricity for the Province of
8 Ontario.

9 But, sir, just dealing with those two
10 paragraphs, my submission to you would be this: It
11 makes it somewhat clearer to me if the first paragraph
12 that you mentioned constitutes a program, let us make
13 that a small 'p' program instead of a capital 'P'
14 program and deal with it in a general way, sir.

15 Because if we flip over to the next page
16 it makes it quite clear that the program, the
17 recommended method of carrying out the undertaking at
18 the time this document was submitted was the program
19 associated with Plan 15.

20 My submission to you, sir, is that now
21 the recommended method of carrying out the undertaking
22 is the program associated with the Update plan. If we
23 flip over to the next page, sir, because let us not
24 read those two paragraphs in isolation from paragraphs
25 19-2, 19-3 and 19-4.

1 And, sir, if I can take you to the top of
2 page 19-3:

3 "Program associated with alternative
4 Demand/Supply Plan 22. One alternative
5 method of carrying out the undertaking
6 is the program associated with candidate
7 Plan 22."

8 And over to the top of the next page,
9 sir, 19-4:

10 "Another alternative method of
11 carrying out the undertaking is the
12 program associated with candidate Plan
13 24."

14 In my submission, sir, you cannot read
15 the two paragraphs on page 19-1 without continuing on
16 to read those two paragraphs as well, and that's my
17 submission.

18 You are dealing here with a program
19 associated with the Update plan. Clearly, clearly as
20 Ontario Hydro's own analysis, sir, those are
21 alternative methods of carrying out the undertaking.

22 And my next step in the process, sir, is
23 that if there are alternative methods of carrying out
24 the undertaking, the Ottawa-Carleton decision again,
25 sir - not alternatives to, alternative methods of -

1 that they are alternative methods of carrying out the
2 undertaking, this Board has the authority, has the
3 power to then start working with the mix, working with
4 the components.

5 My submission to you, sir, is that the
6 Divisional Court in the MEA application dealt with
7 that, contemplated that. And if I could take you, sir,
8 if you have CNA's submission in front of you, if I
9 could take you to the top of page 4.

10 At the bottom of page 3 of the CNA
11 submission and the top of page 4, Mr. Chairman, are
12 excerpts from the February 3rd decision on MEA's
13 Judicial Review Application and the Divisional Court
14 had this to say:

15 "The Board has a most difficult task
16 to perform. It is not the environmental
17 impact of a particular project that is
18 being assessed, but a wide-ranging and
19 far-reaching...", small 'p', "...plan
20 dealing with all of the variables
21 associated with a projected supply of
22 electricity for this province over the
23 next quarter of a century."

24 Dealing with the mix, as Mr. Hunter said.

25 And as I said, sir, if you go to the Chapter 19

1 materials, my submission to you is, is that the program
2 associated with the Update plan is simply an
3 alternative method, it's now the recommended method,
4 and if you go back to the transmission cases you'll see
5 they talk about Plans 1 and 5 and 7 in the southwestern
6 Ontario decision, Plans 1 and 5 and 7. My
7 recollection, sir, was that 7 was the recommended plan
8 but the other two were acceptable.

9 It's the same analysis, it's the same
10 analysis. They are alternative methods. And my
11 submission to you, sir, is that the Divisional Court
12 has recognized this, they have recognized that this
13 Board has the power to change the mix if they so
14 choose.

15 Now, if I could go back for a moment,
16 sir, to my analogy for you, because, again, I agree
17 with Mr. Heintzman's submission that what is happening
18 is that various concepts are being confused, and I
19 would submit to you that one of the concepts that's
20 being confused is the question of the undertaking
21 versus the approvals.

22 And my submission to you, sir, is this,
23 is that the approvals shake out of the method. And if
24 I can go back to my equation analogy, sir, and the
25 thrust of this analysis really, sir, is found at pages

1 6 and 7 of CNA's submission where CNA explains or I've
2 explained the most simplest analysis that can be
3 applied.

4 But to go back to the equation analogy,
5 sir, my submission to you is this, is that essentially
6 what you have, you have strategic decisions, you have
7 implementation decisions, and then you have action step
8 decisions.

9 In other words, sir, if I can take you to
10 CNA's submission at page 6, picking up with just the
11 bottom -- the two paragraphs there are essentially the
12 thrust of CNA's submission.

13 "The definition of the present
14 undertaking is exceedingly broad and,
15 accordingly, the possible alternative
16 methods available to carry it out may be
17 many and varied."

18 But my submission, sir, is this, is that
19 any alternative method has a series of decisions
20 associated with it, and the next couple of paragraphs
21 go on to describe that.

22 "For any alternative method, the
23 program associated with the Update plan,
24 the program associated with Plan 15, Plan
25 22, Plan 24, for any alternative method

1 it's necessary to determine the
2 appropriate components on both sides and
3 the size and the timing. In its simplest
4 terms, the formation of an appropriate
5 method involves decisions about strategic
6 policies, about the steps to implement
7 those policies and about the actual
8 scheduling of the actions required to be
9 taken to bring about timely
10 implementation."

11 So the equation, sir, I would submit to
12 you is $X + Y + Z = A$ and depending on the
13 strategic decisions that you make and depending on the
14 implementation decisions that you make and depending on
15 the timing decisions that you make and the action plan
16 decisions that you make you'll arrive, sir, at
17 different approvals that are requested.

18 And what the Update has done, sir, is the
19 Update has changed the evidence about the various
20 variables.

21 [11:35 a.m.]

22 The Update puts in different values for
23 those X and Y and Z variables, and naturally they come
24 up with different approvals. Naturally you come up
25 with a different sum when you do that. And that's what

1 it is, sir.

2 The Update, as CNA's second submission
3 is, it's opinion evidence. It's opinion evidence, sir,
4 on those variables, the strategic decisions and the
5 implementation decisions and the timing decisions.
6 That's what it is. It's opinion evidence on those
7 variables.

8 As I said, when you start to change the
9 variables, naturally you will arrive at different
10 approvals.

11 I dealt, sir, with the Ottawa-Carleton
12 decision and my submission to you that the focus is, in
13 this particular matter, properly on the powers of the
14 Board and the powers of the Board to approve or
15 substitute or alter alternative methods of the
16 undertaking that are submitted.

17 I will not, sir, make any submissions on
18 the procedural side, you have suggested that you don't
19 wish to hear those this morning and that's fine. Those
20 are, of course, set out in some length in our written
21 submission.

22 THE CHAIRMAN: It is just funding I cut
23 off this morning. I didn't cut off any submissions
24 about procedure, because that's something we have to
25 deal with as Panel 10 is coming up.

1 MR. BULLOCK: Well then, sir, I think our
2 written submission sets those out clearly enough. It
3 deals with the question of how it's unclear whether or
4 not Ontario Hydro remains the proponent of the advocate
5 for major supply. And because of the nature of that
6 situation, depending on the Board's decision in this
7 particular motion, there may well be a need to revisit
8 the funding question and to deal with this question of
9 adjournments. In that respect CNA is very much a party
10 comparable to AMPCO or AECL, and I would simply adopt
11 Mr. Heintzman and Mr. Rodger's submissions in that
12 respect.

13 As I said, sir, I think that is dealt
14 with sufficiently in the written submissions.

15 I would be pleased to take any questions.

16 THE CHAIRMAN: Thank you, Mr. Bullock.

17 MR. BULLOCK: Thank you.

18 THE CHAIRMAN: Is there anyone here from
19 the Canadian Nuclear Association that wants to make a
20 submission?

21 MR. BULLOCK: That was me, sir.

22 THE CHAIRMAN: I'm sorry. A rose by any
23 other name.

24 The Canadian Nuclear Society.

25 All right, I guess it's time for a break,

1 we will take a 15-minute break.

2 THE REGISTRAR: Please come to order.
3 This hearing will break for 15 minutes.

4 ---Recess at 11:37 a.m.

5 ---On resuming at 11:45 a.m.

6 THE REGISTRAR: Please come to order.
7 This hearing is again in session. Please be seated.

8 THE CHAIRMAN: Just to make sure I am not
9 confused, I have got down the Canadian Nuclear Society.
10 Is there anyone here from that organization that wants
11 to make a submission?

12 I have group describe as the Organization
13 of CANDU Industries. Is there someone here that wants
14 to make a submission on behalf of them?

15 Just put a written submission in.

16 And Mr. Power, the South Bruce Economic
17 Development Corporation.

18 MR. POWER: Yes.

19 THE CHAIRMAN: Do you wish to make a
20 submission?

21 MR. POWER: Please.

22 SUBMISSIONS BY MR. POWER:

23 Mr. Chairman, Members of the Board, I
24 just wish to state at the starting that I support, my
25 client supports, the submissions of AECL and AMPCO in

1 particular, and accordingly I intend to address only
2 one specific issue, and that issue is whether Hydro can
3 defer the 6,000 megawatts of planning approval as they
4 are attempting to do in the Update.

5 I would submit, Mr. Chairman, that Hydro
6 cannot defer the 6,000 megawatts of planning or any
7 amount of planning. This is because the undertaking
8 is, as has been discussed and is submitted in the
9 Demand/Supply Plan, a program to meet all electricity
10 demand up to the year 2014. The Update attempts to
11 defer a significant portion of the planning approval to
12 a subsequent hearing.

13 This has the effect, if permitted, Mr.
14 Chairman, of deferring part of the undertaking to a
15 subsequent hearing. Accordingly, I would submit, Mr.
16 Chairman, in other words, the undertaking in the plan
17 would be amended by deferring part of the undertaking.

18 However, in my submission, there is no
19 legal authority for Hydro to be able to defer the 6,000
20 megawatts and the Board does not have the jurisdiction
21 to permit Hydro to do this.

22 Mr. Chairman, my arguments fall into
23 three general areas.

24 Firstly, to permit Hydro to defer any
25 amount of program planning violates both basic

1 principles of natural justice and the Statutory Powers
2 Procedure Act.

3 Secondly, there is no authority in the
4 Environmental Assessment Act upon which Hydro can rely
5 to permit Hydro to amend the undertaking as they are
6 attempting to do.

7 Finally, Mr. Chairman, it is not in the
8 public interest to permit Hydro to defer any portion of
9 the planning up to the year 2014.

10 Before I proceed with those three
11 arguments, I wish to state that I rely heavily on
12 Hydro's statement that the undertaking is a 25-year
13 program to meet electricity demand, and therefore I
14 will not address the issue of what the undertaking is
15 but rather how it should be treated.

16 Turning to my first argument, Mr.
17 Chairman, there are two key legal principles which the
18 Board must, in my submission, apply when reaching a
19 decision required with respect to the Update, two key
20 legal principles of natural justice. Those principles
21 are, firstly, that a hearing or part of a hearing
22 cannot be disposed of without agreement, consent, or
23 waiver of all the parties to the hearing. One party
24 therefore does not have the ability to unilaterally
25 dispose of the hearing or any part of the hearing

1 before the Board, which I submit Hydro is attempting to
2 do through deferring 6,000 megawatts more or less of
3 planning approval.

4 The second principle of natural justice
5 is that any party to a hearing may call and examine
6 witnesses and present arguments and submissions in
7 relation to the subject matter of the hearing.

8 Obviously, if Hydro is able to defer
9 6,000 megawatts, it will have the ability to defer
10 submissions and evidence with respect to how that
11 amount of planning should be argued in front of the
12 Board and the Board's finding on it.

13 Mr. Chairman, these two rules are basic
14 tenets of natural justice, the principles are designed
15 to ensure that once a hearing is properly constituted
16 and it begins, all the parties to the hearing are
17 placed on an equal footing in terms of their ability to
18 effectively present their case and to effectively
19 cross-examine the other parties' case.

20 These two principles, Mr. Chairman, have
21 been codified in the Statutory Powers Procedure Act,
22 and I have given the clerk copies of some of the
23 excerpts which I wish to refer yourself to.

24 I don't know if you wish this marked as
25 an exhibit, Mr. Chairman.

1 THE CHAIRMAN: No, it doesn't need to be
2 if it's a statutory extract.

3 MR. POWER: If I could refer to you
4 Section 4. Unfortunately, it's a poorly drafted
5 provision, so I would like to lead you slowly through
6 this.

7 I would submit that Section 4
8 contemplates the only ways by which a hearing can be
9 ended.

10 Section 4 states that:

11 Despite anything in this Act and
12 unless otherwise provided in the Act
13 under which a proceeding arises... In
14 other words, Environmental Assessment
15 Act, or the tribunal otherwise
16 directs, a proceeding may be disposed of
17 by, (A) agreement; (B) a consent order;
18 or (c) a decision of the tribunal given,
19 (i) without a hearing, or (ii) without
20 compliance with any other requirement of
21 this Act, where the parties have waived
22 such hearing or compliance.

23 Now, Mr. Chairman, none of those three
24 provisions is before the Board at the moment,
25 agreement, consent, or waiver.

1 I submit the only other way that this
2 hearing could come to an end is after all of the
3 evidence and arguments are heard with respect to the
4 subject matter of this hearing, and that subject matter
5 is again, I would submit, a 25-year program to meet all
6 electricity demand up to the year 2014 for the Province
7 of Ontario.

8 I also briefly wish to refer you to
9 Section 10.

10 A party to a proceeding may at a
11 hearing... sub (b) and sub (c) ...call
12 and examine witnesses and present
13 arguments and submissions; and conduct
14 cross-examination of witnesses at a
15 hearing reasonably required for a full
16 and fair disclosure of the facts...

17 I would submit that this section is
18 designed to protect all of the parties to a hearing
19 once a hearing has begun and the subject matter is
20 fully before the Board.

21 In other words, Hydro may now wish to not
22 make argument or lead evidence on 6,000 megawatts of
23 planning, but the remainder of the parties certainly
24 will have the opportunity, do have the opportunity, to
25 lead evidence and submissions as to the remainder of

1 the planning and the approvals that this Board should
2 give regarding the remainder of that planning.

3 Finally, Mr. Chairman, I wish to note, I
4 won't read it to you specifically, but under Section
5 18(20) of the Environmental Assessment Act, this Board
6 is required to follow the Statutory Powers Procedure
7 Act.

8 So the Statutory Powers Procedure Act is
9 binding on this Board.

10 If I may, with that background, I would
11 like to refer to you two cases in the book of
12 authorities which were previously given to you.

13 Under tab 1, there is a decision of Mr.
14 Justice Osler of the High Court of Justice, in Re
15 Henderson and Ontario Securities Commission. In that
16 case one of the issues was whether a party had the
17 right to cross-examine a witness or not.

18 If I may refer you to page 502 of that
19 decision, Mr. Justice Osler sums up the basic principle
20 of natural justice and applies it to that scenario, and
21 I would suggest that his statement here is very
22 applicable to the case we have before us.

23 In the first full paragraph he states:

24 A judicial or quasi-judicial tribunal,
25 such as the Commission, has every right

1 to control the conduct of its hearings
2 and to keep counsel within bounds so that
3 testimony and cross-examination thereon
4 may be confined to relevant and
5 appropriate matters.

6 He then goes on to state:

7 Having accorded status to the parties,
8 however, such a tribunal has in my view
9 no right to vary the degree to which it
10 rights of a party may be exercised or to
11 discriminate between the parties and,
12 particularly, there is no right, however
13 much it may control cross-examination, to
14 prohibit cross-examination in advance of
15 any specific questions...

16 I would suggest that the principle that
17 can be applied from this case is that this hearing
18 began on an undertaking which was to consider planning
19 for electricity demand up to the year 2014, accordingly
20 all the parties now have the right to cross-examine on
21 that matter and to seek from the Board its approval or
22 conditions to the approval or the rejection of the
23 undertaking up to the year 2014.

24 Hydro cannot require the Board to defer
25 this 6,000 megawatts to a subsequent hearing. The

1 matter is now before the Board, all the parties have
2 come prepared it address that issue and they have a
3 right to cross-examine on it and they have a right to
4 make submissions on it.

5 If I may continue on to the next sentence
6 Mr. Justice Osler's statement.

7 ...they have no right to vary the degree
8 to which the rights of a party may be
9 exercised or to discriminate between the
10 parties...

11 I would suggest, Mr. Chairman, that to
12 permit Hydro, now almost at the end of their case, to
13 pull a substantial portion of their planning out of the
14 subject matter of this hearing clearly discriminates
15 against many of the parties here for a variety of
16 reasons which I will refer to shortly.

17 I also wish to briefly refer you to the
18 case which can be found under tab 7, that is a decision
19 of the Environmental Assessment board, Re County of
20 Oxford Holbrook Waste Disposal Site Expansion.

21 In that decision the parties reached an
22 agreement outside of the hearing context by which they
23 wished to end the hearing. They subsequently submitted
24 the decision or their agreement in the hearing to the
25 tribunal. The tribunal determined that there were a

1 number of criteria that had to be reviewed regardless
2 of the parties' submissions in order to ensure that the
3 tribunal's duties were properly carried out.

4 At the bottom of page 71 the Board notes
5 that it is gratified to learn that the parties had
6 reached an agreement and expressed itself accordingly.
7 However, the Board continues, the Board has concluded
8 that there are three criteria to be satisfied before
9 the terms of the agreement could be adopted.

10 And if you turn to the top of the next
11 page, the terms and recommendations should be supported
12 by sworn evidence given at the hearing, the terms and
13 recommendations should be scrutinized by the Board and
14 found to be technically and otherwise satisfactory, and
15 most importantly, I would submit, Mr. Chairman, the
16 agreement must be in the public interest.

17 I would suggest that to now remove a
18 substantial portion of the planning to the year 2014
19 after we have gotten this far into the hearing, we have
20 invested as much money and effort as we have, after the
21 strategies of the counsel for the various parties and
22 the witness panels to date have been affected or have
23 been directed by our belief, our collective belief that
24 we will be including electricity planning up to the
25 year 2014, it is in the public interest that for all

1 those reasons we continue on with considering the
2 original demand/supply program planning to 2014. It is
3 not in the public interest now, after the Province of
4 Ontario has gone through this process and we have spent
5 as much money as we have, time and effort, to
6 effectively drop a substantial part of the hearing.

7 With those background comments in mind, I
8 would like to turn specifically to the Environmental
9 Assessment Act, which is my second argument.

10 I think enough of the other counsel have
11 addressed the Act in detail. I just wish to address
12 the issue of whether the undertaking can be amended by
13 Hydro.

14 Once the undertaking is submitted to
15 Minister and subsequently to this Board, there is no
16 authority in the Act for either Hydro to amend the
17 undertaking or the Board to amend the undertaking, and
18 there is good reason for this. The undertaking is the
19 foundation of the proceedings under the Act and is the
20 foundation of this hearing. The undertaking is
21 reviewed by government agencies and the public prior to
22 the hearing commencing. The comments of the government
23 agencies and the public is final because the
24 undertaking which is submitted a final. Otherwise,
25 there would be several rounds of government review and

1 public comment on the undertaking and it would be
2 modified over time.

3 Once the undertaking is before the Board
4 there is no further opportunity for the public to
5 comment and to determine whether they are affected by
6 the undertaking. To permit the proponent to amend the
7 undertaking partway through obviously could affect the
8 interests of the various parties in the province who
9 now would not have an opportunity to review and take
10 part in this hearing. In other words, the public
11 review period is final because the undertaking is
12 final, that is the foundation upon which we all
13 proceed.

14 This legislative framework makes sense
15 when you consider the requirements of natural justice
16 and of the provisions of the Statutory Powers Procedure
17 Act which I have referred you to.

18 The Act does not permit the undertaking
19 to be amended because the basic principles of natural
20 justice do not permit it.

21 [12:14 p.m.]

22 The proponent does have a right to define
23 the undertaking at the start of the process. The
24 proponent may do whatever it wants in terms of defining
25 it, but once the undertaking is submitted to the

1 Minister and subsequently to this Board, it takes on a
2 life of its own and it must remain as it was originally
3 submitted and cannot be altered during the hearing or
4 at a later date. That is why the Environmental
5 Assessment Act does not permit the proponent or the
6 Board to amend the undertaking once the matter is
7 before the Board.

8 If the Board accepts my submissions on
9 this, I would suggest Hydro is not prejudiced. Ontario
10 Hydro receives approval for a greater amount of
11 planning than they presently desire under the Update;
12 Ontario Hydro doesn't have to build the amount which is
13 approved, they don't have to spend a penny on it;
14 Ontario Hydro still has its choice as to what to pursue
15 within the planning which is approved, regardless.

16 In other words, if we were to take the
17 original Demand/Supply Plan and the Board was to give
18 the approval that Hydro originally requested, there is
19 no guarantee that Hydro would go on to build specific
20 site-specific nuclear, fossil or other generating
21 stations.

22 It would then be up to Hydro to consider
23 within the program or within the undertaking what it
24 wanted to build in the circumstances over time. But
25 there is nothing requiring them or compelling them to

1 go forth and build what they expound or received
2 approval from this Board for.

3 In other words, there is no prejudice to
4 Hydro, in effect, it gets an approval for perhaps more
5 generation than it intends to build but this does not
6 affect their plans.

7 It gives Hydro flexibility to either
8 follow the approval or, if appropriate, to seek further
9 approvals or different approvals once the need and
10 rationale for a new undertaking can be established.
11 And this, in effect, is what Hydro is saying by
12 deferring the major fossil and nuclear generating
13 plants, they are saying: We have to come back to a
14 hearing in any event down the road but within the
15 25-year time frame.

16 Well, if they have to come back in any
17 event, that's their choice and, in my view, given that
18 we have now before us the same issues that would be at
19 that subsequent hearing and we have invested this
20 amount of time and Hydro has spent the money that it
21 already has and called the witnesses, there is no
22 prejudice to Hydro to accept the decision of the Board
23 now on all of the planning up to 2014 and then, if it
24 has to, come back to the Board at a later date for a
25 new undertaking.

1 The prejudice or lack of prejudice to
2 Hydro should be balanced against the prejudice to the
3 intervenors if Hydro is permitted to defer any amount
4 of the undertaking. By removing 6,000 megawatts of
5 planning or any amount of planning up to 2014, Ontario
6 Hydro is attempting to remove a substantial portion of
7 the planning.

8 Accordingly, the ability of this Board to
9 consider a wide variety of alternative methods and
10 approve a variety of alternative methods is
11 significantly limited. This will affect intervenors
12 such as my clients, South Bruce, who will be asking the
13 Board to approve a variety of methods and to approve
14 methods which will have more of an important play in
15 the longer term planning; i.e., 15 to 20 years than
16 they would five to 10 years, which is effectively what
17 the Update becomes if it's accepted.

18 Further, my client became involved in
19 this process because the Demand/Supply Plan is a
20 blueprint for all planning for the Province of Ontario
21 up to the year of 2014 rather than a piecemeal approach
22 and, on that basis, they entered into this hearing
23 because they felt finally everybody will have an
24 opportunity to know what the game plan is up to 2014,
25 everybody will know what Hydro is compelled to live by

1 up to 2014, we won't have to come back every five years
2 to a new hearing. Further, we don't have the resources
3 to come back to a new hearing whenever Hydro wants to
4 call a new hearing.

5 This was their one attempt to have a
6 positive impact on a blueprint for the Province of
7 Ontario and if they are forced to come back to
8 subsequent hearings, that is clearly a prejudice to
9 them in their ability to adequately meet Hydro on an
10 equal footing in a hearing.

11 Finally, Mr. Chairman, I would submit as
12 I have already referred to, that to permit Hydro to
13 defer this is not in the public interest and, in fact,
14 it is in the public interest to include the 6,000
15 megawatts of planning. Again, for the same reasons:
16 it's a blueprint, we will finally have in this province
17 a benchmark for all electricity generating activities
18 for a long period of time where everybody will know the
19 rules of the game, everybody will know how their rights
20 and interests are affected, they will not have to worry
21 but how it may or may not be affected in a piecemeal
22 approach every few years.

23 That's the essence of my submissions, Mr.
24 Chairman. Is there any questions?

25 MS. PATTERSON: Mr. Power, are you

1 essentially saying in the earlier part of your argument
2 that the Board has no power once a hearing is commenced
3 to dismiss the application before every party has had
4 an opportunity to put forward evidence and to
5 cross-examine?

6 For example, a party couldn't bring a
7 motion for early dismissal or essentially a non-suit?

8 MR. POWER: One party does not have the
9 right to unilaterally end this --

10 MS. PATTERSON: But that would be a
11 consideration by the Board and all the parties would
12 make submissions, I assume?

13 MR. POWER: Correct.

14 MS. PATTERSON: You are saying that
15 couldn't happen?

16 MR. POWER: Not unless all the parties
17 agreed to that. I think that's what the statutory
18 Powers Procedure Act specifically addresses, in order
19 to protect the rights of all the parties.

20 DR. CONNELL: Mr. Power, if the Update
21 envisaged greater demand, let us say 6,000 megawatts
22 greater demand, would you be making the same
23 submission?

24 MR. POWER: Yes, because how much
25 electricity demand there ultimately will be is a

1 finding of fact to be made at the end of this hearing
2 after the submissions of all of the parties and that
3 will determine the amount of electricity generation and
4 planning we require to the year 2014.

5 So, while I don't argue over the
6 specifics of 6,000 megawatts plus or minus, what I am
7 saying is whatever the electricity demand is found to
8 be at the end of this hearing up to 2014, is what the
9 undertaking now is before us. So my arguments would be
10 the same.

11 DR. CONNELL: It follows then that the
12 Board would have the authority to approve whatever
13 program of activities was required to meet that greater
14 or smaller --

15 MR. POWER: Yes, sir. Once the need and
16 the rationale; i.e., what the demand is up to 2014,
17 that question of fact is determined the Board must
18 then, in my submission, determine what is the best way
19 to meet that demand.

20 DR. CONNELL: Okay.

21 MR. POWER: And the Board has the
22 jurisdiction to do that.

23 DR. CONNELL: Let me suppose that you, as
24 a single party to the hearing, your client, believed
25 that the demand would be let us say 6,000 megawatts

1 greater than was envisaged in the original
2 Demand/Supply Plan, then according to your perception
3 Hydro would be deferring planning for that 6,000
4 megawatts?

5 MR. POWER: If I understand you
6 correctly, yes, in effect, because they hadn't
7 contemplated that extra 6,000 megawatts of planning.

8 DR. CONNELL: Yet the Board would be
9 entitled to proceed on the basis of Hydro's proposal?

10 MR. POWER: Yes, sir, because that is the
11 way the undertaking is defined by the proponent; i.e.,
12 a plan to meet all electricity generation, whatever
13 that may be, up to the year 2014.

14 Now, based upon that definition it then
15 went on to say they believe the need and the rationale
16 is for X amount of generation. However, that was
17 always up in the air from day one. After that decision
18 is made, then we determine or the Board determines how
19 the demand is to be met.

20 DR. CONNELL: So you are rigidly locking
21 us in to a specific forecast, you would not tolerate
22 even a shift of 1,000 or 2,000 megawatts one way or the
23 other as the basis for deliberations in this hearing?

24 MR. POWER: I'm not sure I understand
25 what you mean. I certainly don't intend to lock the

1 Board into a specific forecast, other than at the end
2 of the day, I believe, the Board has to come to a
3 conclusion as to what the demand will be, and that that
4 is the benchmark or the determination upon which the
5 approvals are given.

6 DR. CONNELL: But I'm just simply probing
7 your understanding of the term "deferred planning", and
8 you are applying that to this 6,000 megawatts.

9 If the variation were only 1,000
10 megawatts, would you still call that deferred planning?

11 MR. POWER: If that 1,000 megawatts could
12 not be met in the plan that Hydro proposes by the year
13 2014 then, yes, I would be arguing that that should be
14 included; however, if it was found that that 1,000
15 megawatts wouldn't not arise until after that date,
16 then I would not be arguing it should be included.

17 DR. CONNELL: I see. So I now understand
18 then. If Hydro's evidence convinces the Board that the
19 reduced demand target can be met, then it is quite
20 appropriate for us to so find.

21 MR. POWER: Yes, sir, it is.

22 DR. CONNELL: Thank you.

23 THE CHAIRMAN: So, in other words, it's
24 open to them to convince us, I understand it, that they
25 don't need the 6,000 megawatts and they can defer it;

1 is that...

2 MR. POWER: Yes, sir, that's correct.

3 However, at present in the Update, they state they need
4 that extra 6,000 megawatts.

5 THE CHAIRMAN: But not within the time
6 parameters that requires action.

7 MR. POWER: Well, not within the time
8 parameters originally contemplated in the Demand/Supply
9 Plan but before the year 2014 they need it.

10 THE CHAIRMAN: I think - and I wanted to
11 make sure I understand - the five-year concept of
12 action plans was part of the DSP planning; is that not
13 correct?

14 MR. POWER: Yes, sir. In Hydro's words
15 it was, yes, sir.

16 THE CHAIRMAN: Well, in Exhibit 3. It's
17 clearly in Exhibit 3; is it not?

18 MR. POWER: Yes, sir.

19 THE CHAIRMAN: So couldn't that be
20 changed, couldn't they say now, and convince us that
21 the approvals they need fall outside the five-year
22 period, and then wouldn't that be a proper reason for
23 not asking for the approvals consistent with Exhibit 3?

24 MR. POWER: I would submit that the
25 five-year deadline is not relevant to the Environmental

1 Assessment Act. What is relevant - I believe Mr.
2 Heintzman alluded to these terms earlier - is the
3 definitions under the Act and the key definition is
4 what is the undertaking, and the undertaking as
5 originally described by Hydro was to meet all
6 electricity generation to the year 2014.

7 Now, part of their planning methodology
8 or rationale was that that would include facilities
9 that would have to be built within five years of a
10 decision of this Board.

11 But that's not relevant, I would submit,
12 Mr. Chairman, to what the undertaking is and how that
13 is treated.

14 THE CHAIRMAN: I really regret that this
15 thing may come down eventually to a semantical
16 analysis, but the language of the undertaking is
17 something that I've gone over once or twice this
18 morning, I don't intend to do it again, but I would
19 have thought that that language left room for some
20 flexibility within the proponent to alter the approvals
21 that it is requesting.

22 MR. POWER: Well, I'm not sure
23 specifically what you mean, sir.

24 THE CHAIRMAN: Well --

25 MR. POWER: In my view, the Board is

1 going to approve various alternative methods of meeting
2 demand to the year 2014. When those alternative
3 methods will be built, we can only speculate because
4 that's in Hydro's control.

5 THE CHAIRMAN: Subject to getting the
6 approvals they need.

7 MR. POWER: Yes, sir.

8 THE CHAIRMAN: All right.

9 MR. POWER: Thank you, Mr. Chairman.

10 THE CHAIRMAN: Northcare. Northcare
11 here? North Channel Advocates here? Organization of
12 CANDU Industries?

13 Is there anyone else who in general - I
14 hesitate to use business as usual because that's
15 probably not the right phrase, but I think the meaning
16 is clear - anyone else who is generally supporting the
17 broad scope of the plan? Mr. Shepherd?

18 MR. SHEPHERD: I realize this is a shock.

19 THE CHAIRMAN: I have long since stopped
20 being shocked.

21 MR. D. POCH: I just want to bring a
22 motion that he change sides of the room.

23 SUBMISSIONS BY MR. SHEPHERD:

24 My friends have been berating me
25 unmercifully over the last week for our position,

1 although I do thank Mr. Rodger for quoting our
2 submissions last April to show that we are indeed
3 consistent.

4 Mr. Chairman, Ms. Patterson, Dr. Connell,
5 the Independent Power Producers Association of Ontario
6 has made extensive written submissions on the
7 implications of the DSP Update and it's not my
8 intention to repeat those submissions here, nor will I
9 speak directly to the motion of the MEA, although I
10 guess it will be clear by the time I finish what our
11 position is on it.

12 With respect to the request for
13 adjournments and the issue of further funding, we adopt
14 the position presented by Northwatch and I won't deal
15 with those questions further.

16 Our written submissions also deal with a
17 number of specific implications of the DSP updates,
18 specific issues that are dealt with differently and
19 things like that, and we have gone into some detail
20 about that and I don't think - unless the Board has any
21 questions - I don't think I want to go through those
22 again.

23 What I would like to do is concentrate on
24 the overall implications of the DSP Update and, in our
25 view, you can analyze that from basically three

1 different perspectives: The legal perspective, which
2 is what we have heard a lot of here; the strategic
3 perspective, which I'll comment on briefly; and the
4 substantive perspective, which is what I want to
5 concentrate on. I think that each of the intervenors
6 has, as we did, looked at the question from these
7 different points of view and let me start with the
8 legal implications.

9 We have presented in our written
10 submissions a detailed legal analysis which concludes
11 that the proponent's description, definition of the
12 undertaking is ambiguous and, in effect, that leads to
13 two possible results, two possible ways of resolving
14 that ambiguity.

15 One is to say that they have asked for
16 approval of specific things but they have only asked
17 for part of the approval, requirement and rationale for
18 those things. The other way is to say that they have
19 asked for approval of requirement and rationale and the
20 requirement and rationale they present is the DSP.
21 And, therefore, by definition they have asked for
22 approval of the DSP.

23 We believe that the former
24 characterization cannot be sustained and, therefore,
25 that the latter is the only other way out of the

1 ambiguity. And we will note in the main portion of
2 these submissions that it is also the only way that is
3 consistent with the public interest.

4 I will make one comment on that former
5 characterization, that is to say that what Ontario
6 Hydro has sought is approval of specific components but
7 only the requirement and rationale of them.

8 Mr. Chairman, the proponent is entitled
9 to describe the undertaking and to define the
10 undertaking, that's clear in the law, although I
11 commend to the Board the comments of Mr. Jeffrey when
12 he was Chairman in the Timber Management case, which I
13 believe, although it was a Class EA, was very similar
14 on the issues to exactly what we are doing here.

15 However, leave that aside. The proponent
16 does have the right to define the undertaking, the
17 proponent does not have the right to define the
18 approvals. The Environmental Assessment Act is crystal
19 clear on this. The proponents says this is our
20 undertaking, the Environmental Assessment Act says this
21 Board can then approve or not that undertaking.

22 The proponent cannot come and say here's
23 our undertaking only approve so -- give us so much
24 approval.

25 THE CHAIRMAN: I don't know whether it

1 makes any difference, but it's approval to proceed with
2 the undertaking, isn't that what it says?

3 MR. SHEPHERD: Exactly, exactly.

4 THE CHAIRMAN: Then I suppose it would be
5 up to the proponent the extent to which they want to
6 proceed.

7 MR. SHEPHERD: Oh, undoubtedly. But what
8 the proponent appears to suggest here is that they have
9 said -- let me give you an example. We want to build a
10 transmission line from Manitoba to Central Ontario, and
11 they have said: Well, all we want you to do is analyze
12 whether, yes, indeed it's a good idea in general.

13 We have met the first part of the test
14 requirement and rationale, but at a later site-specific
15 hearing they have agreed on the record that
16 site-specific Board could say: None of these sites are
17 acceptable, you can't build it.

18 Well, they are not allowed to say that to
19 you and you don't have the power to make that decision.
20 You have the power either to say yes you can do it or
21 no you can't. They don't have any right to sort of
22 divide it up. That creates the ambiguity and it's
23 essential to a planning hearing that you resolve that
24 in a way that makes some sense.

25 [12:35 p.m.]

1 What we have proposed is that where they
2 want to do that, what they are effectively doing is
3 they are saying, we want only the planning approval,
4 then the plan is on the table.

5 We have developed that in more detail in
6 our written submissions and I won't go further into it.

7 Let me deal briefly with the strategic
8 issues which nobody has talked about yet, although in
9 their own offices they have talked about them a lot.

10 We, like everybody in this room,
11 considered the strategic implications of the DSP Update
12 relative to the point of view espoused by our clients.
13 We looked at the impact on the length of the hearing,
14 the political and practical implications of that. We
15 looked at the changed perceptions in perceived
16 alliances, plan supporters versus plan opponents and
17 whether those had changed. Whether we would end up
18 being lumped in with AECL, as discomfoting as that may
19 be.

20 We looked at whether we or other
21 intervenors now have more or less to win or lose by
22 either a broader scope or a narrower scope. And we
23 looked at whether the greater financial resources of
24 some parties might become more important if the hearing
25 is broader as opposed to narrower. And we are not the

1 only ones that considered these issues.

2 AECL may well have considered whether a
3 longer and more complex hearing benefits them because
4 of their vastly superior financial resources compared
5 to the environmental groups. AMPCO may well have
6 considered whether, with nuclear now potentially off
7 the table, pushing for a broader scope gives them a
8 better chance to get it back on the table. And this is
9 all just realism and every party here looked at these
10 things.

11 We concluded in the end that the apparent
12 strategic considerations are, in the end, a red
13 herring. We are not concerned that a broader scope
14 will cause us to lose something we have won, if indeed
15 we have won anything at all in the Update, we are not
16 concerned that this Board will allow the disparate
17 financial resources of the intervenors to have any
18 influence on this hearing's outcome, nor are we
19 concerned that the broader scope of the hearing will
20 result a longer hearing, potentially waiting out a
21 government disinclined to approve central generation.

22 We can't really comment on whether
23 internally to the other intervenors those are valid
24 concerns.

25 The point I am making is that those

1 concerns which underlie all of the discussion here
2 today are and should be irrelevant to this Board's
3 decision.

4 Now, having said what we think is not
5 important, we are left with what we think is important,
6 and that's the substantive side this debate, and it
7 boils down in my view to looking at what is in the
8 public interest.

9 Some years ago when I started practicing
10 law and even in the time before that when I worked for
11 a bank, I was constantly reminded by superiors, by
12 colleagues, by peers, by clients, remember who you are
13 working for.

14 In this case, in my view at the outset of
15 this hearing, we were all hired by the public to do a
16 job. The Board, the Board staff, everyone else in this
17 room, and I am not just saying the people who got
18 intervenor funding, Ontario Hydro, the other
19 intervenors, all ultimately being paid by the public,
20 have all been hired by the public to accomplish a
21 certain task. We are debating here today for this
22 before this Board is: What is that task that we were
23 hired to do. Once we figured out what they asked us to
24 do at the outset, we have to deliver that.

25 So what is the task we were hired today?

1 What is our deliverable?

2 The answer to that lies not in looking at
3 the Environmental Assessment Act, or in looking at the
4 notice of hearing, or in looking at the reference from
5 the Minister, or anything of that of else of that
6 nature. Sure, we can look at the question very
7 technically with our lawyer hats on, and we have to in
8 some respects. We can parse the wording of the
9 reference and we can analyze, ad infinitum, the wording
10 of the Act.

11 We can, if we wish, ignore the common
12 sense view of the average person and ignore the fact
13 that every penny we are spending comes from them and
14 it's their interests that are on the table.

15 That's not how we should look at it. I
16 ask what the task is we were hired to do, the answer
17 lies very simply in putting ours on the street in
18 January of 1990, mentally, and asking them what was
19 expected of us. And how do we determine what our
20 answer would have been? Common sense tells us that.

21 This process has so far is cost \$60 or
22 \$70 million perhaps, and for the last year has involved
23 over 1,000 people. If you look at it on the broader
24 scale including DSOS and DSPS before it, this process
25 has consumed probably \$250 million over seven or eight

1 years of the evolution of this phase of electricity
2 planning, culminating in this environmental assessment.

3 There is may be another 30 or \$40 million
4 to spend over another 18 months to two years. Rounding
5 it off, we are talking about an entire process that
6 represents an investment by the public of perhaps \$300
7 million and 10 years time. And for that investment,
8 what did the public expect?

9 Well, it didn't expect a decision on
10 whether to upgrade a few generating stations on the
11 Mattagami River and build a transmission line to
12 Manitoba. It didn't even expect that it would be
13 limited to approving a nuclear station or not. And it
14 absolutely did not expect that those 10 years would
15 produce a result with a 5-year time horizon.

16 What the public expected for their money
17 and their patience was a seminal public debate on
18 long-term electricity planning in this province.
19 That's why the process was worth the time and the money
20 and that's the value the public expected to receive
21 from that time and money.

22 This shouldn't come as a surprise to any
23 of us. As Mr. Rodger has pointed out, look at what we
24 all said to the public at the outset of this process.
25 We told them that it would be a broad ranging public

1 debate. Exactly what they asked for. We told them
2 that we would deliver.

3 The Minister of Energy spoke out on the
4 issue in public, said, this is what we are going to do,
5 we promise you this debate.

6 The Chairman of Ontario Hydro went on
7 speaking circuit with the same message.

8 I couldn't resist this, I'm sorry, I also
9 have a quote I would like to read. On 6 November 1989
10 the Minister of Energy announced that the plan known as
11 the Demand/Supply Plan would be subject to a review and
12 a public hearing under the Environmental Assessment
13 Act.

14 That's from the 1991 annual report of the
15 Environmental Assessment Board.

16 We all told the public that this is what
17 we were going to do.

18 Well now we have to deliver. We were
19 hired to do a job, now we have to do the job. It
20 simply does not lie in our mouths today to say, well,
21 yeah, okay, we took your money and took all that time
22 and it was a lot of fun, but now there is nothing left
23 to decide.

24 The public has at all times expected us
25 to hold a public debate on whether the conventional

1 central supply view of electricity planning or the
2 newer sustainable decentralized view of electricity
3 planning was a better approach in the long term and
4 what, if any, balance or common ground could be found
5 between them.

6 The public appointed, through the
7 government, the three members of this panel as their
8 proxy to hear that evidence, to hear what everybody had
9 to say, to look at it in detail, and provide some
10 answers.

11 The bottom line is, when you take on a
12 responsibility you have to meet that responsibility.
13 We all took on the responsibility to do a certain job
14 and now we simply have to do it.

15 Now, just in this regard, I have only two
16 other comments.

17 A number of my friends will remind you
18 that this is not a Royal Commission. That's quite
19 correct, it isn't.

20 One of the reasons why the EA process was
21 selected as a forum for this debate was that its result
22 is one that has teeth, it can be enforced. The
23 government, in my view, wanted the public's investment
24 over the years to culminate in a decision that could be
25 implemented, not just in another few years of talk and

1 a thick document with nice words in it.

2 The government also, I believe, wanted to
3 recognize by a selection of forum that electricity
4 planning is in many respects quintessentially
5 environmental and realized that the environment had to
6 be put back to the top of the issues list in the
7 electricity debate.

8 So the Minister, in referring this
9 undertaking to this Board, opted to use the
10 Environmental Assessment Act for something it was
11 designed for, a planning hearing, even though that use
12 of the Act was largely untested. There was a risk to
13 that. There was a risk that the Board would define its
14 role narrowly, rather than recognize that it was
15 dealing with a new type of EA hearing and respond
16 accordingly.

17 So far, this Board has been prepared to
18 recognize the different scope of this hearing and to
19 stake out a planning role for the EA process that is
20 neither as toothless as a Royal Commission, nor as
21 narrow as a typical regulatory hearing. We are asking
22 you to maintain that broad scope and to deliver to the
23 public the result that they asked us to achieve at the
24 outset.

25 Now I just have one other comment.

1 Nobody so far has talked about the
2 implications of this Board's decisions today on the
3 environmental assessment process as a whole.

4 I believe we ignore that issue at our
5 peril, so I will put to you the question directly.
6 What is the effect on the environmental assessment
7 process and it is value to the public if we cut this
8 debate off or narrow its focus now?

9 I will tell you, in my view, if you
10 really want to call into question in the minds of the
11 public the value of the EA process as an effective
12 forum for environmental planning, the very best thing
13 to do is tell the public two years into a possess
14 costing tens of millions of dollars that what it is
15 going to get is part only a decision on two specific
16 short-term projects and no decision or commentary on
17 the long-term future of electricity planning in this
18 Province. If that's the result, what we are telling
19 the public is that the environmental assessment
20 process, faced with a really tough job, simply can't
21 cut the mustard, and that's not the answer we should
22 give them.

23 The answer we should give them is, we
24 know what they asked us to do, we are going to do it
25 and we are going to deliver. It's as simple as that.

1 Those are my submissions, Mr. Chairman,
2 unless you have any questions.

3 THE CHAIRMAN: Thank you, Mr. Shepherd.

4 I think I asked for any others that fell
5 into that category and Mr. Shepherd volunteered. I
6 would now like to move to the Municipal Electrical
7 Association.

8 MR. MARK: Mr. Chairman, I understood
9 from your remarks this morning that we were going to
10 have a somewhat different procedure.

11 THE CHAIRMAN: Did you? Well, you may
12 have a different....

13 MR. MARK: I thought that the scheme was,
14 Hydro, then those business as usual, those who thought
15 a somewhat different scope, and then you would hear
16 from us.

17 Frankly, Mr. Chairman, it makes some
18 sense. I think there is no issue hear that the motion
19 we are bringing is rather seminal to this, and I think
20 Mr. Poch or his cohorts addressed in their submission
21 on the order. That one way or the other I am going to
22 have to respond to what other people have been saying
23 about it whether they purport to or not. For me to
24 stand up in the middle of the intervenors submissions
25 and be able to reply to some but not to others doesn't

1 make a heck of a lot of sense, respectfully.

2 THE CHAIRMAN: I certainly wouldn't cut
3 off your right to reply. I don't feel strongly about
4 it one way or the other. I just thought that your
5 group and those associated with it would be next, and
6 then the Coalition, but I don't really feel strongly
7 about it.

8 If Mr. Poch and the others want to go
9 now, that is fine with me.

10 Are you prepared to go?

11 MR. D. POCH: I am content to proceed
12 now.

13 THE CHAIRMAN: All right, Mr. Poch, why
14 don't you proceed then.

15 MR. MARK: Thank you, Mr. Chairman.

16 MR. D. POCH: Apparently my cohorts are
17 too. I am not sure about my co-conspirators.

18 THE CHAIRMAN: I don't know whether this
19 is helpful or hurtful. I just have great difficulty
20 identifying who you should group together in this
21 hearing anyway. [Laughter]

22 MR. SHEPHERD: So do we.

23 SUBMISSIONS BY MR. D. POCH:

24 Mr. Chairman, I am going to be referring
25 to a transcript which I will just hand up to the

1 Registrar.

2 Mr. Chairman, I will begin in somewhat
3 reverse order by commenting briefly on a few of the
4 points made earlier.

5 While I think you will find some
6 similarities between the position that we advocate and
7 that of Ontario Hydro, I must disagree strongly with
8 Mr. Howard's characterization this morning that Hydro
9 was still putting forward a planning approach that
10 conforms to its strategy as outlined in Exhibit 74.

11 I think, if you refer to page 20 of
12 Exhibit 452, Hydro makes it very clear there that there
13 are too different approaches, plan to the high, plan to
14 the median, they weigh one against the other and they
15 say, given the circumstances they have evolved, the
16 approach of planning to the median in their view is now
17 the preferred approach.

18 Now, whether that is deviating from
19 planning methodology or not I leave to you, but I think
20 it's important that that be said.

21 Mr. Heintzman for AECL is, in his written
22 submissions, quite clear. He states, and I believe the
23 reference is at page 6, paragraph 13 of his
24 submissions, that an undertaking must have a time
25 period attached. And in his submissions this morning,

1 went on at some length to try to demonstrate to you
2 that the time period associated in his view with the
3 undertaking is the 25-year period ending in 2014. And,
4 of course, we have heard from most of the speakers this
5 morning agree with that.

6 I believe that that is a mis-
7 characterization of the position that Hydro has taken.
8 It is certainly not the interpretation we have placed
9 on the position that Hydro has taken. I will want to
10 point that out strongly because Mr. Heintzman tries to
11 put words in our mouth and suggest that the position is
12 shorter, rather the undertaking covers a shorter time
13 frame by virtue of the Update. He suggested we made
14 that submission in our written submissions today and I
15 want to be very clear that we make no such submission.

16 Our submission is that the period
17 associated with the undertaking has always been the
18 5-year plus lead time criterion.

19 There is clearly also a 25-year period
20 referred to in the DSP, and that is the period
21 associated with the Plan. This, it seems to me, is the
22 key, the key point, the key distinction, the
23 distinction between the Plan which includes a number of
24 elements that are not up for approval, and which
25 covers, indeed covers more than a 25-year period as was

1 pointed out by one speaker this morning, and the
2 program which is limited in time to those specific
3 components that would be needed to meet load within
4 this shorter five years plus lead time period, which
5 for simplicity I will simply refer to the 2006, 2007
6 horizon.

7 I won't respond to the suggestion that
8 the components are somehow the method. I think the
9 section in the Balance of Power the Chairman has
10 pointed to make it clear that Hydro has been reasonably
11 clear on this at least from the outset, that the
12 components are specific technologies, specific options.

13 I think if I were asked to state the
14 description of what we view as the undertaking, I would
15 say this: In essence, Hydro is requesting approval for
16 specific amounts of specific technologies as needed, so
17 there is some flexibility, in a specific time frame,
18 and that that approval is not a full approval, it is
19 conditional upon subsequent site-specific approvals.
20 That is the program for which Hydro seeks approval. It
21 is a program which is indeed based on a broader and
22 longer term plan, but it is not the plan that is the
23 undertaking; it is the program.

24 Mr. Howard pointed you to the action
25 plans definition in Chapter 18 of the Balance of Power,

1 which is where the narrower time frame is most clearly
2 set out.

3 I would also refer you to the discussion
4 we had about this in the record. I passed up to the
5 Registrar the excerpt from the transcript, which is
6 from Volume 49, on August 22nd, 1991.

7 [12:55 p.m.]

8 There I have highlighted just a few
9 sections of that rather long excerpt which I would like
10 to bring to your attention.

11 I at that time indicated - this was in
12 response, I believe, to one of the first mentions of an
13 update - and I said: Well, can you tell us now,
14 Ontario Hydro, and the reference -- I'm going to begin
15 on the first page at line 18 of transcript page 8806:

16 Can you point us -- tell us if any
17 of the specific components have moved
18 past... - and the words I used were
19 ...the five-year date, the magic date
20 that Hydro has limited its request for
21 approvals from you to; that is, supply
22 projects for which approvals will be
23 required within five years.

24 And at page 8808, the top, Mr. Campbell
25 replies:

1 "With respect to the approvals
2 generally, the five-year horizon that Mr.
3 Poch -- the way in which the approvals
4 were defined was a five-year horizon from
5 the date of an approval being received,
6 should one be received, from these
7 proceedings after appeals. And, of
8 course, that date itself now has been a
9 bit of a moving target."

10 And further at page 8812 I elaborate, I
11 believe it was in response to the Chairman's query, and
12 I refer to how there were specific facilities,
13 commencing at line 4 here, though labeled "CANDU A" and
14 that do not have a specific site, and I point out
15 that's especially so in the case of hydraulic, and they
16 are up for approval in principle. And I refer to the
17 old jargon of need.

18 I go on to point out that elements could
19 be deferred to a point where approval is no longer
20 sought, and I refer to that five-year horizon.

21 And I agree with Chairman's observation
22 that that, of course, still involves a consideration of
23 broader issues and I continue to agree with that
24 observation.

25 Finally, at page 8816, line 13, the

1 Chairman specifically puts it to Mr. Campbell:

2 "Do you agree with Mr. Poch on the
3 five-year aspect?"

4 Mr. Campbell replies:

5 "Yes. The way the envelope of
6 projects that was to be included in
7 approvals was defined was basically the
8 way he has described."

9 I don't know why, if this was a problem,
10 my friends representing AMPCO or AECL didn't stand up
11 and raise their concerns at that time. Perhaps at that
12 time they thought it would still get them an approval
13 for their favourite option and now their favourite
14 option isn't needed in that time frame and so they are
15 somewhat disgruntled.

16 I think that it was clear, if not before,
17 certainly then, that there are two time periods, and I
18 would describe the 25-year time period as being the
19 time period which Hydro has looked at in putting
20 forward its rationale, its rationale under Section
21 5(3), an obligation that any proponent faces under the
22 Act.

23 Whereas the shorter period, five-year
24 plus lead time, is the time period that Hydro selected
25 as being the applicable time frame that delineates the

1 approvals sought, and I would equate approvals sought
2 with undertaking.

3 And, specifically, the Act distinguishes
4 between rationale, which is a Section 5(3)
5 consideration and an obligation on the proponent to
6 show that there is a logic behind the approval
7 requested and what gets approved, which is the
8 undertaking not the rationale.

9 I think that Hydro, if guilty of anything
10 is guilty in its definition of what it is seeking here
11 of seeking approval for the rationale for the
12 undertaking. I think that that is a term which is too
13 easily confused because, of course, it's a term that
14 appears in Section 5(3). I think a better way to
15 define what is being sought is a program which is a
16 group of options or facilities, and that it is
17 conditional, it's a program approval because it covers
18 more than one facility, and it's program approval
19 because it is not a final approval because it is
20 conditional upon site-specific approvals later.

21 THE CHAIRMAN: I apologize for
22 interrupting you, but today we have to stop--

23 MR. D. POCH: That's fine, Mr. Chairman.

24 THE CHAIRMAN: --sharp at one o'clock, so
25 I hope you don't mind and we will continue at 2:30.

1 MR. D. POCH: Thank you, Mr. Chairman.

2 THE REGISTRAR: Please come to order.

3 This hearing will adjourn until 2:30.

4 ---Luncheon recess at 1:00 p.m.

5 ---On resuming at 2:30 p.m.

6 THE REGISTRAR: Please come to order.

7 This hearing is again in session. Be seated please.

8 MR. D. POCH: Mr. Chairman, following on
9 my comments earlier, it would be our submission that
10 the planning methodology is part of the rationale for
11 the undertaking under Section 5(3) and you must examine
12 that methodology and indeed you must accept the offered
13 rationale, or a preferable rationale that someone else
14 may offer, or that may be simply apparent from the
15 evidence in order to reach any conclusion at all which
16 involves approval of any facilities.

17 So I would say whatever the outer limits
18 of this approval may be and of the undertaking, we will
19 not have wasted the vast amounts of money that my
20 friend Mr. Shepherd referred to in any event because I
21 assume this Board will comment on the methodology,
22 that's a relevant matter whichever view you take of the
23 scope of the undertaking, and your comments on
24 methodology will be around to inform electricity
25 planning for as long as those comments have currency.

1 In that regard -- well, I'll return to
2 that. The corollary, of course, is that the
3 methodology is not the approved undertaking, and we
4 equate the action plan to the undertaking.

5 The Update then is an alternative method
6 of carrying out the undertaking and, as it turns out,
7 for the Board to accept that that alternative is indeed
8 the preferred alternative from the broader public
9 perspective, the Board would have to find that Hydro's
10 original planning rationale was less desirable than
11 their current preferred rationale, and that is
12 precisely - the rationale being part of the
13 Environmental Assessment Document as encompassed by
14 Section 5(3) - that is precisely what the Board is
15 allowed to do under Section 12 of the Act. The Board
16 may approve the Environmental Assessment or amend and
17 approve the Environmental Assessment.

18 This is where the Board gets its
19 jurisdiction to amend the rationale to support its
20 choice of what is indeed the preferred alternative
21 method of carrying out the undertaking, or to dismiss
22 for failure for an alternative method to be shown to be
23 in the public interest.

24 The eastern case which has been referred
25 to makes it quite clear that the Board has that power

1 to approve alternative methods, and my friend Mr.
2 Campbell points to me - I don't have the decision in
3 front of me - that in fact the technical route to that
4 is through the terms and conditions power; that is, you
5 are approving the undertaking and/or an alternative
6 method of carrying out the undertaking, and you impose
7 that method by condition, at least in Mr. Campbell's
8 interpretation, and frankly I'm not concerned whether
9 you actually approve the alternative method or you seek
10 that end by condition. I'm not sure that anything
11 today turns on that, so I won't take a hard and fast
12 position on that interpretation.

13 Now, as I indicated earlier, it's our
14 position that the undertaking is delineated by some
15 time line and on that reasoning the alternative
16 methods, approvable, would similarly be - to be
17 alternatives to the undertaking or, rather, alternative
18 methods of carrying out the undertaking - must
19 similarly be constrained by that time limit.

20 The logic of the time limit that Hydro
21 has chosen, whether we accept it or not, but they have
22 chosen a time limit based on the logic of the longest
23 lead time option plus the five years to allow them to
24 obtain the site-specific approvals.

25 In essence they are saying they want to

1 be able to include a consideration of all the options
2 and if they can show that they need an approval now,
3 then they should be able to get that approval now; if
4 it turns out that for any given option they don't need
5 an approval now because the load forecast doesn't
6 predict such need, then they don't seek such approval.

7 And, as we have set out in our
8 submissions, we see wisdom in that because the world is
9 a very fast changing place and it would, in our view,
10 not be in the public interest to commit to plans beyond
11 those necessary to commit to.

12 I have set out in our submissions what we
13 believe flows from this, that the Board must indeed
14 prioritize options that it finds are needed within that
15 time horizon, but not go further. And, again, I'll
16 return to that in a moment.

17 One implication of this is that
18 alternative methods for this period - I will call it
19 the pre-2007 period - are approvable so long as they
20 were encompassed by the original approval sought.
21 Thus, the Board could approve less supply or more, and
22 they could indeed include in their approvals, we would
23 acknowledge, you could include in your approvals an
24 option such as a 4 by 881 megawatt nuclear station
25 Hydro originally sought approval for if, in your

1 wisdom, you felt it was indeed needed on that time
2 horizon. Hydro may not choose to proceed, that would
3 be their election.

4 Now, I will come back in a minute to
5 distinguish that from other alternative methods which,
6 while approvable within the rubric of the eastern
7 decision, other considerations apply which may make
8 them not approvable in practice.

9 We invite the Board to be quite clear, if
10 it can, on what - first of all, premised on the
11 acceptance of this position that the undertaking is
12 defined by this time horizon - then we would invite the
13 Board to be quite clear to indicate how far its
14 comments would go with respect to options which are
15 not, in fact, found to be needed within that time
16 horizon.

17 And we do so simply for the very
18 practical reason that if, for example, this Board can
19 tell us that it will go as far as it needs to go to
20 approve options in that time frame, presumably with
21 some degree of flexibility and a mechanism imposed by
22 condition to tell Hydro how it exercises that
23 flexibility - and in our submissions we spell out at
24 some length that mechanism and I won't go into that
25 today - we would ask the Board to say that it will go

1 no further, because that will allow us to, I believe,
2 save considerable hearing time that would otherwise be
3 required of us to debate the relative merits of, in our
4 view, what would be a debate between long-term fossil,
5 long-term nuclear and long-term conservation in the
6 period post-2007, in the period up to 2014 and beyond.

7 If the Board accepts that, one, we are
8 constrained by the definition of the undertaking Hydro
9 has given us and they accept my interpretation -- and
10 you accept my interpretation of how that undertaking is
11 defined, then, one, I would argue that it simply would
12 be inappropriate to go beyond that as a matter of
13 jurisdiction.

14 THE CHAIRMAN: I hear what you are
15 saying, at least I think I do, but how are we going to
16 know that. We are not going to be able to know that
17 until the very end of the day - at least if I'm hearing
18 you correctly - so what could happen is we might follow
19 your suggestion and restrict the scope of the hearing
20 and then, at the end of the day, find that we came to a
21 conclusion that what had to be done within the time
22 frame was different than we perhaps first perceived it
23 to be. Is that a difficulty?

24 MR. D. POCH: Yes, Mr. Chairman. I
25 understand completely your point, and it would be up to

1 us to exercise -- not up to yourself, up to us to
2 exercise judgment as advocates of how far we felt that
3 we needed to go.

4 I'm comfortable that if the Board accepts
5 that 2007, whatever this line is, is as far as the
6 Board will go and the Board will commence its
7 prioritization of options and consideration of how much
8 is available and will stop at the point when it's
9 comfortable that it has provided enough to meet the
10 needs in that time frame, I will council my clients and
11 my clients will make a judgment as to whether or not
12 they need worry about this Board, and the worry that we
13 might have would be approving large-scale fossil or
14 approving nuclear.

15 Now, you could not commit that you would
16 not do so, and it would be up to us as a matter of
17 judgment to decide how much energy we wanted to focus
18 on those issues as opposed to other options.

19 Now, I can assure you will be, in Panel
20 9, cross-examining Hydro about the nuclear option, even
21 though they aren't pursuing that now. We will go far
22 enough so that we believe we can satisfy the Board that
23 in the time frame being considered it's just not one of
24 the options that makes sense, but if we are faced with
25 a possibility of a decision which either decides or

1 comments on the priority of options, the need for
2 options in the longer period we will feel it necessary
3 to go further. Because, of course, the uncertainty is
4 greater the farther out we go --

5 THE CHAIRMAN: Perhaps I am
6 misunderstanding. Isn't this a matter of evidence?

7 There are parties here who consider that
8 even the original DSP was not conservative enough in
9 anticipating future electricity needs in the province,
10 there should have been provision for more supply, and
11 that kind of argument is going to be, I'm sure, pursued
12 by some of the intervenors, and how are we ever going
13 to know until the end of the day what the time frame
14 ought to be. That's my difficulty.

15 MR. D. POCH: I would suggest, sir, that
16 that's the one thing you do know, the time frame. You
17 may not know until the end of the day how much supply
18 is appropriate to approve as opposed to demand
19 management, and that will include an assessment of how
20 to deal with a change in load forecast, but I believe
21 that the time frame is indeed limited by the fact that
22 that's how Hydro has defined the undertaking.

23 In essence they have said, the
24 undertaking is a program of options to get us through
25 the next - it's about 15 years now, it was about 20

1 when they cast that in the Balance of Power - to get us
2 through until about 2007.

3 THE CHAIRMAN: Supposing we were to
4 conclude that Hydro was wrong about that, that there
5 wasn't going to be a surplus in the year 2,000 that, in
6 fact, there might be a deficit - which some of the
7 parties are urging us to accept - then how can we
8 possibly make any final decision about that until we
9 have heard all the evidence.

10 MR. D. POCH: I'm agreeing, sir, you
11 could not, and we run the risk that you will find that
12 and that we will have soft pedalled our assault on
13 nuclear on the assumption that you will find there's a
14 surplus or that, even if there's a deficit of
15 facilities, there's sufficient other resources that are
16 preferable environmentally, cost wise to fill that gap.

17 And we are not completely lacking
18 caution. We will lead some evidence on that option.
19 It's just in determining how far to go, that guidance
20 from you of the line would be very helpful to us.

21 DR. CONNELL: Mr. Poch, along a similar
22 line, when you were discussing Section 12 of the Act
23 and the powers that are vested in the Board under
24 12(2)(e), that is imposing terms and conditions, I
25 think I would have interpreted your remarks as

1 encompassing at least the possibility that the time
2 frame could be amended too if there is cogent evidence
3 to suggest that the time frame which you have cited is
4 inappropriate for whatever reason.

5 MR. D. POCH: Well, Dr. Connell, I would
6 agree that it would be appropriate to address the
7 question of what is an appropriate time frame to plan
8 on as part of your consideration of the rationale of
9 the preferred methodology.

10 I would not agree that it's open to the
11 Board to change the time line of the undertaking.
12 That, I would argue, is what Hydro has defined and they
13 will live or die by that. The 2007, if you will, is
14 part of the description of the undertaking, which is
15 not available to us to question.

16 DR. CONNELL: But that clause (e) refers
17 explicitly back to clause (d) which refers to the
18 undertaking; that is, the terms and conditions modify
19 the undertaking; do they not?

20 MR. D. POCH: Yes, I would agree with
21 that, and that is Mr. Campbell's interpretation at
22 least of the eastern decision is how the Board would
23 access alternative methods of carrying out the
24 undertaking, and indeed we have argued that you should
25 impose a number of conditions.

1 I would argue that you cannot change the
2 purpose of the undertaking or the fundamental nature of
3 the undertaking.

4 DR. CONNELL: Changing five to six or
5 four is not changing fundamental purpose; is it?
6 [2:50 p.m.]

7 MR. D. POCH: Well, I think it becomes a
8 question of everyone in the hearing room knowing what
9 they are wrestling with. We come to a hearing prepared
10 to deal with a given undertaking, and it can take
11 various forms.

12 For my own client, as I suggested in that
13 section of transcript earlier on, we felt that the date
14 that is the far end of the undertaking was one of those
15 fundamental determinants of what it is we are wrestling
16 with.

17 DR. CONNELL: Well, that may be so, and I
18 am not meaning to suggest any predilection for
19 arbitrarily changing dates, but I am not sure that we
20 can could right now foreclose the possibility that some
21 party to the hearing might persuade us that there is
22 some basic fallacy in the five-year time frame.

23 MR. D. POCH: I have no doubt that some
24 will try and that it would be perfectly appropriate for
25 the Board to find that either Hydro's action plan is

1 inappropriate in the time frame or that its planning
2 methodology is based on a time frame which is not the
3 best time frame. And if it's the latter, the Board
4 would be free to amend. If it's the former, the Board
5 can accept that this is the undertaking, or can say, we
6 don't think this is a sound way to proceed and we
7 therefore decline to approve the undertaking.

8 At some point the Board reaches the limit
9 of its jurisdiction which stems from the application.

10 We are argue that Hydro chose to define
11 its undertaking, in not many respects but at least in
12 that respect as being limited in time.

13 THE CHAIRMAN: But this may not be final.
14 A year from now we may have Exhibit 852 which tells us
15 that there is a complete change in the projection for
16 demand and so on.

17 This a moving target. There is no way
18 that you are going to snapshot this problem because the
19 day you do it, the next day it comes out of date and
20 not useful.

21 I find it very difficult to think that at
22 this stage we might somehow or other put barriers
23 around things. I think that's my difficulty.

24 MR. D. POCH: Yes.

25 THE CHAIRMAN: Maybe we can within

1 certain parameters, but it's not an easy thing to do
2 because life just doesn't stand still.

3 MR. D. POCH: No, I don't disagree, Mr.
4 Chairman.

5 And indeed my comments on what the
6 definition of the undertaking is and therefore what
7 defines alternatives available for approval is not
8 premised on the Update. There was no need to address
9 this point before now, the Update has precipitated this
10 discussion, but it's not premised on the Update.

11 We may revert back to Plan 15 being the
12 preferred plan because Hydro changes its load forecast
13 and preferred rationale, and so on again, and in which
14 case they will be back before you again saying, give us
15 an approval for one or two, 4 by 881 nuclear plants.
16 And indeed, I would expect that other parties, given
17 their statements earlier, will be in fact be arguing
18 that Hydro has blown it, that they picked a bag
19 rationale, or they have ranked the options incorrectly
20 or they have made assumptions about option
21 availability, and you still need to consider approving
22 such options.

23 But I guess all I am suggesting is there
24 has to be some limit to what this hearing is about.
25 Some have suggested that limit is 25 years. I am

1 suggesting that Hydro has been clear in their
2 application, and it was there prerogative at the outset
3 and they exercised that and they set a limit, and we
4 have relied on that and it is appropriate to continue
5 to do so.

6 I should say, Mr. Chairman, that we have
7 a history of course of inquiries into electric planning
8 in Ontario, and I guess the most recent one that's
9 really on point would be the Royal Commission on
10 Electric Power Planning and Dr. Porter reported in
11 1980. Here we sit in an application that commenced
12 in -- it was laid out in '89 and the hearings that
13 really began in to form in 1990, ten years later, and I
14 assume that's because there is a recognition that Dr.
15 Porter's wisdom starts to get aged at a certain point.

16 We have fast-changing technologies,
17 options, fast-changing load, understanding of load
18 growth, economy, fast-changing environment, most
19 certainly, and even fast-changing values which are up
20 there.

21 And so quite a part from the legal
22 constraint, which I argue limits jurisdiction, I think
23 as a practical matter - and this is real a matter for
24 evidence and argument at the end of the day, it would
25 be inappropriate to make decisions which could be

1 relied upon as a right by a proponent in the year 2014,
2 or for the year 2014.

3 So I believe that the conclusion I urge
4 upon you based on the law is quite a comfortable one
5 based on the policy considerations, at least it is for
6 my client.

7 I did say I would return to the question
8 of other alternative methods that weren't included in
9 the proponent's initial application.

10 I argue that there is really problem in
11 that what Hydro is asking for approval for was all
12 within the four corners of its original application.
13 Clearly, they have changed their rationale and
14 presumably they will be offering evidence for that
15 changed rationale which gives them a different set from
16 within the menu that they had offered earlier, but
17 that, as I say, is open to the Board to amend.

18 What then of the case of an alternative
19 method so theoretically provable within the eastern
20 decision, but that one that was not within Hydro's
21 original program. And I think the obvious example is
22 the other CANDU 6 option, CANDU 3 option, which it
23 would seem clear that some parties may wish to advocate
24 as a preferable option.

25 The problem arises for this reason:

1 There is no environmental assessment document in
2 support of a CANDU 6 or a CANDU 3, to date there is no
3 evidence either.

4 Hydro last relied in its application, for
5 example, on the Ontario Nuclear Cost Inquiry which is
6 specific to the 4 by 881 option; it relied on Ontario
7 Nuclear Safety Review, Dr. Hare's review, which is
8 specific to 4 by 881; their evidence on safety and
9 environmental impacts, for example, this seven volume
10 Darlington probabilistic safety evaluation which we
11 managed to get through the interrogatory process is
12 specific to the four, very specific to the 4 by 881
13 option. Of course most of our thousand or so
14 interrogatories are specific to that and our
15 investigation. Our funding and therefore the
16 investigation of our experts was specific to that, and
17 in particular we have gone into some detail on a risk
18 assessment which is quite technology specific.

19 There is really only one part of Hydro's
20 application where they delve into the other nuclear
21 options, and I will just refer to you the pages. It's
22 at 14-29, 14-31 and following in the Balance of Power,
23 Exhibit 3. And there they offer their reasoning for
24 why they chose the various major supply options that
25 they then include in different mixes in the competing

1 programs.

2 They basically explain why they narrowed
3 it down to the type coal plant, the type of IGCC, and
4 the 4 by 881 megawatt CANDU. There is a specific
5 section on that, starting at page 14-31, rationale for
6 selecting option 11, 4 by 881 megawatt CANDU, and they
7 go on indeed to tell why they reject it, CANDU 3 which
8 was the characterization of the small stand alone
9 CANDU.

10 Now, we have relied on that and Atomic
11 Energy of Canada Limited or some other party may wish
12 and be able to convince you that Hydro has, as I said
13 earlier, blown it, by excluding these options from its
14 program and from its consideration of alternatives, its
15 final consideration of alternative programs.

16 We would argue that no approval could
17 issue for such an option unless somebody had satisfied
18 the burden of a proponent under the Environmental
19 Assessment Act. They would have to provide a full
20 environmental assessment of that option at the level
21 appropriate for this hearing, including how it compares
22 to competing alternatives and so on.

23 Now, short of satisfying that burden,
24 that's not to say it's pointless for them to present
25 their options, they can present their options and seek

1 a rejection of Hydro's preferred method, which would be
2 the current program.

3 Assuming then for the sake of argument
4 then that a CANDU 6 is an alternative method which
5 could be put in place prior to 2007, and assuming that
6 a party does indeed come forward and wants to champion
7 that alternative, the constraint we face is really one
8 that we can could characterize as a constraint of
9 natural justice. We will have gotten late notice, if
10 you will, of that option. And I distinguish that from
11 placing differing reliance, for example, on non-utility
12 generation, or conservation, which were a part of
13 Hydro's initial application, and we all understood from
14 the outset that that was what this debate was about,
15 trading off those various options.

16 Now, conceivably this problem could be
17 cured. We could adjourn, if indeed someone wishes to
18 put themselves in that position of an alternative
19 proponent. We would obviously be seeking an
20 opportunity to get added funding and have time to
21 research the matter and so on. And I think given the
22 fact that Hydro has expressed no interest in pursuing
23 that, that would be a terrible waste of time and money
24 for the public.

25 On the other hand, I understand that a

1 party who feels that they have the right answer, would
2 complain that there would be a terrible waste if they
3 didn't get to present that option. I think that one
4 possible route would be to have such parties who seek
5 actual approval of alternatives not included in Hydro's
6 original array, they should present their evidence
7 following Hydro and once they have closed their case,
8 the Board could rule on whether they were satisfied
9 they had satisfied the first test, adequacy of the EA,
10 if you will, if there was an adequate basis for
11 considering an approval of that option. And if so,
12 whether there has been a prima facie case made that
13 that was indeed the preferred option, and only then if
14 the Board had given affirmative to both of those
15 questions would it be necessary for anybody in my
16 position to ask for funding or an adjournment, and in
17 our view it's very unlikely that that would be
18 necessarily.

19 Now, am not sure that any of the parties
20 are indeed suggesting to you that they want to get an
21 approval for one of those alternative methods. It may
22 be that they are content to have your wisdom in telling
23 Hydro off, that they have blown it somehow, and they
24 can pursue an approval on their own.

25 MS. PATTERSON: Mr. Poch, how do you

1 differentiate between alternatives methods and
2 alternatives to the undertaking if another party can
3 seek to have an alternative method added to the options
4 here, and I impose that on Hydro for approval.

5 MR. D. POCH: I think as a practical
6 matter they can't impose it.

7 I mean, if the evidence were clear and
8 there was sufficient evidence -- I think it is quite a
9 hypothetical. I was I guess trying to make the case
10 and it's quite hypothetical that anyone could actually
11 fulfil that burden. But conceivably if someone put
12 forward enough evidence and there was a full case that
13 satisfies the requirements of the Environmental
14 Assessment Act and persuades the Board that this is the
15 preferred option, and otherwise fulfils -- it does
16 fulfil the description of the undertaking, the purpose
17 and so on. It's not an all alternative to.

18 So long as notice and natural justice
19 requirements were met, conceivably there is no reason
20 why the Board could not approve, and Hydro would have
21 its election.

22 I think as a practical matter, there will
23 in almost all cases be notice constraints, be natural
24 justice constraints, and just be the practical
25 constraint if Hydro is clear, that it would not if

1 elected I will not serve, then I think the Board would
2 be entitled to say there is really no proper public
3 purpose served in spending the great amount of time and
4 money involved in pursuing that.

5 I guess I do want to preserve for that
6 the Board that option because I can conceive of an
7 alternative method being, for example, if Hydro said,
8 conservation is an alternative method, they may not
9 agree with that because they argue they don't need an
10 approval for it, but we only think it's an alternative
11 method for the first 1,000 megawatts, I would hate to
12 see a board artificially constrained in not being able
13 to give an approval for the second, third and 10,000th
14 megawatt, because I think that the Board would in
15 effect would have weighed the matter and it may be that
16 Hydro's view would change in light of an actual
17 approval.

18 I am just going to move on to briefly
19 touch on matters arising from MEA's motion and I will
20 be quite brief in anticipation, and hopefully avoid the
21 need for any further comment.

22 I think we are we are in agreement with
23 the MEA that the Update discloses the inadequacy of the
24 environmental assessment. On the other hand, we have
25 been arguing, I think, made our position clear that we

1 think the initial environmental assessment was also
2 inadequate. I think it would be our position the
3 Update is simply more evidence of the inadequacy of
4 Hydro's approach.

5 We may well be in the shoes that MEA is
6 in of bringing a motion to dismiss, but we would do so
7 at the close of Hydro's case.

8 We would argue that the mere fact that
9 Hydro has changed its preference amongst alternatives,
10 its preferred rationale is not a reason in itself to
11 dismiss so long as they are still seeking an approval
12 that falls within the original four corners of the
13 application, and we would argue they do, that is in
14 terms of the technologies, the options, which comprise
15 the program, for which they are seeking approval.

16 Indeed, for the very reasons that the
17 chairman referred to, we have a moving target and so
18 on, we believe as a common sense practical matter to
19 freeze Hydro rigidly in only being able to lead
20 evidence in support of what was interest preference in
21 1989 would indeed be unduly constraining and
22 unrealistic in the circumstances.

23 Now, I have already made the point that
24 we disagree with MEA's assertion that they all of a
25 sudden are planning to a five years and weren't before.

1 I think I have set out our reasons for taking the
2 position that that has been the basis from the outset.

3 In short, our position is that MEA's
4 motion is premature.

5 Thank you, Mr. Chairman.

6 THE CHAIRMAN: Thank you, Mr. Poch.

7 Mr. Kelsey, would you be prepared to go
8 now?

9 MR. KELSEY: Yes, sir.

10 SUBMISSIONS BY MR. KELSEY:

11 I will be quite brief. You have my
12 written submissions and I don't propose to go through
13 them again.

14 There are some things I would like to
15 address in light of what has been said so far today on
16 the two issues that you raised, the scope of the
17 hearing and the nature of the process to carry that
18 through.

19 One of the difficulties that we have, of
20 course, is that almost a year after we started these
21 hearings we still don't have unanimity on what is the
22 undertaking, and we have a great diversity of view as
23 to whether the candidate plans and the Update itself
24 constitute alternatives methods or alternatives. And
25 the DSP itself, as has been pointed out, is many

1 ambiguous because in Chapter 18 the rival candidate
2 plans describe as alternative DSP plans, and in their
3 description in Chapter 19 they are described as
4 alternative methods.

5 Hydro today hasn't enlightened us any
6 further as to whether they are alternatives or
7 alternative methods.

8 The position that it seems to be adopting
9 and saying as little as possible is that the
10 undertaking hasn't changed.

11 Well, the form, I suppose, of the
12 undertaking hasn't changed, but certainly its content
13 has. Its content is completely different and its whole
14 philosophy is completely different from the way it was
15 when these hearings started. And maybe the reason that
16 Hydro has to take that position is that because if it
17 says that the undertaking has changed, then it's got
18 obvious problems of notice and possible amendment.

19 If it takes the position, and it is
20 taking no position on whether the alternative plans or
21 alternative methods or alternatives, and if Hydro takes
22 the position that they are alternative methods, then of
23 course the original alternative case plans are still
24 open for approval before this Board, and it would
25 appear in view of the position that they are taking on

1 the Update that that isn't what they want.

2 Now, the whole situation must have
3 changed. The undertaking must be completely different
4 because all you have to do is look at the shifting of
5 alliances among the various groups that has taken place
6 and the views that are now expressed by -- AMPCO, for
7 example, describes the Update as a complete change in
8 philosophy and we now have the MEA moves its position
9 towards wanting no hearing at all, IPPSO seems to have
10 moved away from the environmental groups, the
11 environmental groups are now much closer, it would
12 appear, in philosophy to the approach of Hydro, and
13 Hydro's opponents now appear to be the nuclear
14 industry.

15 [3:12 p.m.]

16 That's exactly the opposite of the way it
17 was when this hearing started. And then to say: Well,
18 there's no change in the undertaking and the
19 undertaking has then no impact, is a somewhat head in
20 the sand approach, I would have thought.

21 Now, these decisions obviously on what is
22 the undertaking and what are the alternatives and what
23 are alternative methods will have to be made
24 eventually, because in order for this Board to decide
25 whether or not there is an environmental assessment to

1 accept, it's got to come to a conclusion that Hydro has
2 complied with Section 5(3) of the Act and described
3 alternatives and alternative methods, and if there
4 aren't any, then there's no environmental assessment to
5 accept.

6 But it may be at this stage that it's
7 unnecessary to come to any final view on the nature of
8 the undertaking, lacking any assistance from Hydro in
9 that endeavour, and that it also may be unnecessary at
10 this stage to come to any view on whether the
11 alternative plans or alternatives or alternative
12 methods, and it may be premature, it may not even be
13 possible to resolve these ambiguities at this stage and
14 you may well be right, Mr. Chairman, that it's only at
15 the end of the hearing that all may become clear.

16 Now, in that event, in order to
17 accommodate the advocates of the nuclear industry, who
18 clearly are much put out that the nuclear option seems
19 to have been shoved to one side, or at least beyond the
20 25-year period, then it may be necessary to have a
21 nuclear panel.

22 But the purpose of having a nuclear panel
23 is not as Hydro suggests in the Update to get an
24 expression of your views in a vacuum, the only purpose
25 of the nuclear panel would be to determine whether or

1 not the nuclear option was part of an alternative
2 method, and the nuclear panel, if there is one, would
3 be directed to that issue only. Hydro presumably would
4 have to show why the nuclear option within the 25-year
5 planning period is not to it now an alternative method.

6 So, again, the position has shifted, that
7 Hydro would be justifying why it does not now consider
8 nuclear an option and the nuclear industry will have to
9 be arguing that Hydro should have considered it as an
10 option but only, as I say, directed towards not some
11 kind of expression of views in the abstract or in a
12 vacuum, but just to determine whether, in your view --
13 if, for example -- as you have pointed out, Mr.
14 Chairman, if the Board concluded that the load forecast
15 was understated and that there was a need for more
16 supply than Hydro is now asserting, then the nuclear
17 industry obviously would have an argument on an
18 alternative method, there would have to be a
19 determination at that stage as to whether there was, in
20 fact, an alternative method as opposed to an
21 alternative. It may well be, given the present
22 situation of uncertainty and the possibility that there
23 may be updates, that the nuclear industry on the one
24 hand has to have the opportunity of putting that
25 forward, just as the, broadly categorized as the

1 environmental groups, must have the opportunity in
2 relation to the Update to put their alternatives too
3 and also to question the underlying rationale approach
4 and figures of the Update, too.

5 That leads to the question of the
6 appropriate process to carry out the purpose that I've
7 indicated, given that there is what I would certainly
8 describe as a significant shrinking of the undertaking,
9 certainly full of material differences, there should
10 be, as I suggested in the written submissions, a panel
11 dealing solely with the Update to examine in the light
12 of Hydro's previous evidence the requirement and
13 rationale for the Update and how the conclusions in the
14 Update were arrived at.

15 You may recall that there's one example
16 that occurs to me in the course of my cross-examination
17 on Panel 7 on the Manitoba transmission line, it was
18 acknowledged by the Hydro witnesses that it would be
19 necessary - and this is before January the 15th - to
20 have a re-evaluation of the rationale for the
21 transmission line. That's just one example.

22 If I am right and the Update is such a
23 radical shift in approach and philosophy, then clearly
24 Hydro can't just produce a 40-page document and say:
25 This now stands in the place of the five year's work

1 and all the documents that we produced in order to
2 arrive at the 1989 Update and it's necessary to have a
3 panel on that to deal with all the issues arising out
4 of the Update and the justifications for it.

5 The other proposal that I have made in
6 the submissions is for a panel dealing with the
7 continuing examination of Hydro's activities and I
8 think you, Mr. Chairman, used the expression that we
9 can't have a snapshot, and that is quite true, and the
10 Update of course establishes that, and Hydro's
11 continued statements that there may be further need for
12 updates supports that.

13 The reason that I suggested that there be
14 a panel to consider a continuing process is that very
15 reason, and also that Hydro in itself in the Update has
16 said that it will be necessary to have some kind of
17 procedure to monitor not only future planning but also
18 what has already been done by Hydro in compliance with
19 their existing conditions.

20 So that the two consequences that flow
21 from the Update, the establishment of its rationale,
22 and putting in place a process for taking care of
23 future updates and the monitoring of their activities,
24 in my submission, would be essential.

25 This doesn't involve telling Hydro how to

1 present its case, but involves the Board merely in
2 defining the scope of the hearing from now on in light
3 of what has happened.

4 Thank you.

5 THE CHAIRMAN: Thank you, Mr. Kelsey.

6 Mr. Mattson.

7 SUBMISSIONS BY MR. MATTSON:

8 Thank you, Mr. Chairman.

9 Mr. Chairman, as with the others, you
10 have received my written submissions and I do not
11 intend to review that document here. Rather I would
12 like to respond briefly to a number of the issues that
13 have been raised by others.

14 And, if you can bear with me, there may
15 seem to be some overlap, but I think it's all part and
16 parcel of trying to present a clearer picture than what
17 others have done this morning.

18 My submissions can be separated into
19 three parts, and the first is, I would like to deal
20 with the distinction between the undertaking and the
21 assessment, the benefits of continuing the hearing with
22 a narrowed undertaking, and submissions pertaining to
23 be findings on alternative methods or alternatives to
24 the undertaking.

25 Beginning, Mr. Chairman, Energy Probe

1 submits that the filing of the Exhibit 452 has narrowed
2 the scope of the undertaking and the range of approvals
3 but has not changed the nature of the undertaking, nor
4 has it changed the scope of the assessment.

5 Flowing from this, Mr. Chairman, if I
6 might, I think that the first main issue of this
7 hearing has not changed since the assessment was
8 originally filed; and, that is, that the Board must
9 still determine if the assessment is an acceptable
10 basis upon which to make a decision concerning approval
11 or denial of the undertaking.

12 And, second - and this decision has
13 changed slightly because of the Update - is the Board
14 must determine if the updated undertaking should be
15 approved or denied or approved with terms and
16 conditions.

17 I think, Mr. Chairman, that stopping
18 there for a moment, what I have said so far is very
19 much in accordance and similar to what Ontario Hydro
20 has submitted in their document and to that point I'm
21 very much in agreement with Ontario Hydro's
22 submissions, but I think there's been a great deal of
23 confusion caused this morning between the distinction
24 of what an assessment is and what the undertaking is
25 and that it's an important one.

1 The assessment itself is set out at
2 Section 5(3) of the Act and it includes things, the
3 purpose of the undertaking, the rationale for the
4 undertaking, alternative methods of carrying out the
5 undertaking, alternatives to the undertaking, and all
6 of these must be compared, the advantages and
7 disadvantages with respect to the environment, and the
8 alternative methods of carrying out the undertaking and
9 with the alternatives to the undertaking, again, all
10 compared with respect to the environment as defined.

11 Then we go to Section 7 of the Act and
12 that deals with the procedure for government review of
13 the assessment and also sets out the procedure for
14 amending the assessment, not the undertaking, but the
15 assessment itself. And Section 12(c) of the Act deals
16 with Board's role in determining whether the assessment
17 is acceptable.

18 We have environmental assessment boards
19 then, Mr. Chairman, going on and interpreting the Act
20 to say that the assessment also includes all the oral
21 and written submissions that you hear before you, this
22 is all part of the evolving nature of the assessment,
23 it's an expanded definition that gives the evolving
24 nature of the process and provides the most
25 comprehensive and up-to-date material.

1 And, accordingly, Mr. Chairman, the
2 assessment is a broad base of information upon which to
3 make a decision concerning approval or denial of the
4 undertaking, and this assessment includes the 25-year
5 planning rationale and philosophy that Ontario Hydro
6 submits to support their preferred undertaking.

7 This morning a number of people
8 interpreted what Mr. Howard had said with respect to
9 what the undertaking was, and I just point to page 2 of
10 their submissions and I think it's very clear from
11 that, Hydro is very clear when they said what the
12 assessment was, and that was No. 2, issues associated
13 with the acceptability of the environmental assessment
14 include whether Ontario Hydro's 25-year planning
15 framework provides an appropriate basis for
16 decision-making.

17 This was not changed by the Update. It's
18 not the undertaking that includes the 25-year planning
19 process, it's the assessment that includes that 25-year
20 planning process.

21 The undertaking, as I've noted, Mr.
22 Chairman, is a different matter and differs from the
23 assessment. And the undertaking in Section 5(3) of the
24 Act, along with the purpose of the undertaking, is
25 determined by the proponent alone and the proponent,

1 Hydro, has defined it as the program.

2 So far we have had people talking about
3 programs and plans. Well the plans are subsumed in the
4 assessment and the program is the undertaking. That's
5 what the undertaking is, that's how Hydro has defined
6 the undertaking before you, and the best decision, Mr.
7 Chairman, concerning the proponent's right to change
8 the undertaking is set out in material filed by Mr.
9 Campbell --

10 THE CHAIRMAN: I hate to do this again,
11 but the undertaking is defined on page 19-1 and part of
12 that definition is exactly as you said, but it's not
13 the entire definition.

14 MR. MATTSON: No. But, Mr. Chairman, it
15 is the part that's subject for approval and that's --
16 if you go to Section 12(2)(d) or (e), that's what they
17 are talking about with respect to the undertaking,
18 that's the second decision.

19 Of course, on the assessment under
20 Section 12(2)(c) and whether or not the assessment is
21 complete, Ontario Hydro has included a number of things
22 that are not up for approval, and those are part of the
23 plan and those are there for you to interpret and to
24 consider the rationale and the requirement before
25 determining whether to approve the undertaking, which

1 is the program.

2 Mr. Chairman, Mr. Campbell for the
3 Coalition of OPHA and IICPH at page 2 of their
4 submissions, and was also referred to earlier by Mr.
5 Howard, it quotes the Ontario Hydro Southwestern
6 Ontario Bulk Electricity Undertaking, 1983, and I would
7 just like to read two paragraphs because it deals with
8 a number of issues right there in that case that are
9 before you this morning.

10 It reads at page 275, the Joint Board
11 stated:

12 "We have, however, agreed that the
13 undertaking may change as the assessment
14 process continues and, since the hearing
15 is part of the process, the undertaking
16 may be amended up until the time the
17 decision is rendered. Any change in the
18 undertaking must come from the proponent
19 since, by definition, the undertaking is
20 the proponent's preference from one of
21 the alternatives."

22 If I could just stop, before going on.
23 Mr. Chairman, it's the proponent's preference from one
24 of the alternatives. We have had many people talk of
25 alternatives to, alternative methods, that can be for

1 argument, but the undertaking is the proponent's
2 preference and that's the program, that's what we are
3 dealing with and that is what, with respect to approval
4 or denial. That is the second part of the decision
5 before you.

6 Now, continuing in the quote:

7 "With any amendment to the
8 undertaking, the rules of natural justice
9 apply to determine the extent to which
10 the assessment process would have to be
11 repeated. Amendments which result in an
12 undertaking of an entirely different
13 nature may require starting the process
14 from the beginning; whereas minor changes
15 to the undertaking may be made without of
16 giving any further notice or repeating
17 any procedures."

18 Mr. Chairman, the question is: How has
19 Hydro's Update changed the undertaking and simply, in
20 Energy Probe's submissions, it's narrowed the scope of
21 the undertaking by having a program that requests fewer
22 approvals. It did not result in an undertaking of an
23 entirely different nature.

24 With respect to the issue of rules of
25 natural justice, no rules of notice have been breached

1 by adopting a more narrow request for approvals, the
2 nature of the program remains the same, it merely
3 contains fewer components and if intervenors are given
4 an opportunity to examine Hydro's evidence to support
5 the Update, then I believe no rules of natural justice
6 will have been infringed.

7 Mr. Chairman, one intervenor counsel
8 compares the change in Hydro's undertaking to that of a
9 proponent of a landfill site who, halfway through the
10 process, replaces landfill with recycling and
11 incineration and that's at page 19 of the MEA
12 submission, you don't need to turn to it I'll read the
13 quote:

14 "Could a proponent of a landfill site
15 substitute recycling and incineration
16 halfway through a hearing. While perhaps
17 differing in degree, in principle Hydro
18 is here attempting the same."

19 Mr. Chairman, my point is that the
20 comparison is not only differing in degree, but it's
21 altogether and wholly inappropriate as a comparison to
22 what took place here.

23 It's not analogous to what Hydro has done
24 in the Update. It's a good example of how a proponent
25 might change the undertaking which results in an

1 undertaking of entirely different nature, but what
2 Hydro's Update has done to the undertaking is more
3 analogous to a landfill site proponent who began asking
4 for a certificate of approval for a certain tonnage
5 waste and then halfway through the hearing reduced that
6 requirement dramatically in light of evidence
7 indicating a lack of need and demand for the site.
8 This obviously would not change the nature of the
9 undertaking and would not be an inappropriate change if
10 supported by the evidence at the hearing.

11 This is, in essence, what I submit
12 Ontario Hydro has done in the Update. They are seeking
13 less because, in their opinion, there's no rationale or
14 requirement for the original larger undertaking. So
15 it's been narrowed to conform with what the proponent
16 now believes is justified.

17 Mr. Chairman, if I can move on to my next
18 submissions, and then the benefits of continuing the
19 hearing with a narrowed undertaking. There have been a
20 number of written submissions arguing that the hearing
21 should provide a blueprint for electricity planning
22 beyond the scope of the approvals.

23 I submit that the value of this
24 assessment is necessarily limited to the value it has
25 in deciding to approve or deny the undertaking before

1 you. We have been engaged in such a broad study of
2 electricity, demand and supply options and planning
3 philosophies and strategies to build an information
4 base upon which to make a decision on the undertaking,
5 and that is what the plan and that's what the
6 assessment is about. The value of the assessment
7 process and the information before the Board is
8 relevant to approval or denial of decision, but beyond
9 this immediate time frame the evidence begins to become
10 stale and meaningless.

11 To argue that Hydro's forecasts and
12 planning methodologies of today could be used to plan
13 the next few decades seemingly unacceptable. The vague
14 and uncertain evidence we have before us today
15 concerning future technologies and their environmental
16 impacts versus other future alternatives and
17 alternative methods and their environmental impacts
18 make it prudent to avoid providing or adopting a
19 blueprint.

20 If the proponent or the intervenor want
21 to argue that this hearing can form the basis for a
22 blueprint for electricity planning then the Board would
23 have to decide pursuant to Section 12(c) of the Act
24 that the information before it today is sufficient upon
25 which to make a decision for approving a plan that is

1 not to be implemented for some 10, 20, years from now.

2 The difficulty of such an argument, Mr.
3 Chairman, I believe has caused the proponent to limit
4 the request for approvals to a reasonable time frame.
5 The original DSP and the Update both do that, they both
6 request approval for only those programs which need to
7 begin development within five years of the Board's
8 decision.

9 [3:30 p.m.]

10 Accordingly, while we submit that the
11 assessment including Hydro's 25-year plan must be
12 determined to be an acceptable basis for making a
13 decision concerning the undertaking before you go on to
14 make that second decision, that this does not require
15 approval of the assessment or that the assessment be
16 adopted as an acceptable blueprint for a 25-year
17 electricity plan.

18 Mr. Chairman, if you accept the argument
19 that the assessment remains broad in scope but that the
20 undertaking is narrowed considerably by the Update,
21 this raises the question as to whether the all the
22 time, effort and money that has gone into this hearing
23 is warranted.

24 I quote as just an example from page 5 of
25 AMPCO's submissions, and they say that:

1 AMPCO submits that the hearing was
2 never intended to arrive at a set of
3 findings which would be constrained by
4 the narrow boundaries of a five-year time
5 line. To advance this argument is to
6 suggest that the Board's decision has no
7 relevance beyond the planning period
8 contained in the action plan. AMPCO
9 respectfully submits that to relegate the
10 value and significance of the Board's
11 finding exclusively to the action plan
12 would be unreasonable given the context
13 of the extensive and comprehensive nature
14 of the public review associated with the
15 DSP. It must be remembered that the DSP
16 hearing represents the culmination of
17 over seven years of extensive preparation
18 by the proponent which involves
19 considerable preliminary public and
20 government reviews.

21 And I also note, Mr. Chairman, the
22 remarks of Mr. Shepherd this morning who talked about
23 the task that we purportedly have here in representing
24 the public and that that task is to come to some sort
25 of conclusion, some sort of consensus.

1 Mr. Chairman, Energy Probe does not
2 quarrel with the fact that the potential commitment for
3 new supply in the undertaking has been severely limited
4 in the Update. However, this in no way affects the
5 hearing's significance or any decision that will be
6 made by you at the end of the day.

7 When Hydro filed the original DSP in 1989
8 everyone understood and anticipated that the hearing
9 would be one of largest every, costing millions and
10 taking years. And however this hearing's outcome was
11 necessarily limited to a number of decisions which
12 could be legitimately made pursuant to the Act, and all
13 parties understood that the hearing's possible outcomes
14 were set out in Section 12 of the Act. And the
15 assessment, as I have gone through, Section 12 sets out
16 exactly what the Board can determine, the assessment
17 has been to be accepted and then the Board can decide
18 whether to approve or deny or approve with conditions.

19 Any one of these outcomes, any one would
20 be legitimate and would fulfil the purposes of the
21 hearing, and justify the time and expense. And if, for
22 example, this Board designed to deny the approvals, to
23 deny the undertaking put forward by Hydro, the hearing
24 would not have wasted time and money.

25 So denial, first of all, is not a waste

1 of time and money.

2 And, Mr. Chairman, your remarks earlier
3 about what if the Board does not agree with Hydro's
4 plan or their planning framework of five years, and if
5 you don't find nuclear power to be an alternative
6 method or fossil fuel to be an alternative method for
7 the purposes of the 24- to 2,800 megawatts within the
8 approvals, within the program sought, then this
9 program, this undertaking has to be denied. There is
10 no other alternative, to take an alternative to, which
11 would be a functionally different type of undertaking
12 and supplant it for Hydro's undertaking.

13 Like any feasibility study, Mr. Chairman,
14 that determines whether a project should go ahead,
15 money is spent upfront to ensure that big mistakes are
16 avoided in the future. A feasibility study could
17 recommend not proceeding with the project and it would
18 not be criticized as a waste of time and money because
19 it avoided proceeding with an unwarranted project. The
20 same is true for the Demand/Supply Plan. A denial of
21 the undertaking or a finding that the assessment is not
22 a complete plan or the vision is flawed would not
23 render the hearing a waste of time.

24 In fact, the scrutiny of the process, Mr.
25 Chairman, already can be made said to have contributed

1 to taxpayer savings of billions of dollars as the
2 Update represents the proponent's downsizing of its
3 expansion plans in response to evidence heard at this
4 hearing and evidence that's come before you so far.

5 Now, obviously, Mr. Chairman, vested
6 interests who were counting on approval of Hydro's
7 original undertaking and plans to build new plants or
8 who were cutting on increased electricity sales are
9 very disappointed. But the rejection by the proponent
10 of major supply capital intensive projects does not
11 render the evidence heard to date or the continuation
12 of the hearing a waste of time. And in addition, the
13 evidence still to be heard, Mr. Chairman, may lead to a
14 further rejection of the updated undertaking and leave
15 Hydro with no authority at all to build new supply.

16 So an outcome many intervenors dismissed
17 at the beginning of the hearing, that is denial of the
18 undertaking, is more credible and has some momentum in
19 light of Hydro's downplaying of megawatts that are
20 included for approvals in the light of evidence we have
21 heard with respect to rising rates and waning demand,
22 and most certainly, Mr. Chairman, in light of the
23 potential for vast amounts of economic and
24 environmentally preferable independent power that Hydro
25 has testified sit as proposals on Mr. Eliesen's desk.

1 If Hydro's reason for preferring the
2 undertaking to these alternatives NUG proposals, for
3 example, is not justified, then Hydro will not have
4 justified their expansion plans at all. And we have
5 heard of over 6,000 megawatts of independent power on
6 the president's desk, and we have heard evidence about
7 it.

8 Personally, Mr. Chairman, maybe it's not
9 a matter of dismissal of this undertaking, and there is
10 no authority, no one who has brought a motion this
11 morning with respect to denial, but certainly solely on
12 the evidence you have heard before you, there is
13 certainly a case that may be made at some time that the
14 undertaking should be denied, but dismissal is another
15 matter. That would prevent the evidence of the
16 intervenors which is now prepared and is about to come
17 before you within the next year,

18 Energy Probe submits, Mr. Chairman, that
19 the hearing's function is not to salvage the interests
20 of those who want to keep open planning options of
21 building or constructing major supply plans that are
22 not part of the approvals requested. And no amount of
23 time and no amount of money spent in this hearing to
24 date would justify such an exercise.

25 The final point, Mr. Chairman, is with

1 respect to determination of alternative method or
2 - alternative to intervenor cases.

3 First with respect to the submissions on
4 whether the original DSP is an alternative method or an
5 alternative to the undertaking, Mr. Chairman, I believe
6 its premature for this Board to make this determination
7 at this time.

8 No one has brought forth any evidence
9 with respect to how they see their alternative method
10 or their alternative to, it's not in front of you at
11 this time.

12 I have been before this Board before with
13 respect to a funding decision, arguing for funding,
14 trying to make prima facie case with respect the
15 reasonability or the rationale behind getting funding
16 for an alternative to, and it was clear at that time
17 there was a great deal of discussion among all the
18 people who are here before you today that that is
19 impossible until the information has come before to
20 make that determination.

21 So to argue today, when we are having a
22 discussion about the scope of the hearing, to argue
23 that people need a determination of whether something
24 is an alternative method or alternative to I think is
25 premature.

1 I also think, Mr. Chairman, that the
2 original DSP Plan 15 is a program that involves
3 building a great deal more supply than the proponent is
4 now requesting in the Update, and that therefore if you
5 are going to make a determination, I think you should
6 look at it as an alternative to, because the definition
7 set out for alternative to in the OWMC case which is
8 that it is a functionally different way of approaching
9 the problem.

10 Mr. Chairman, as I have noted,
11 intervenors who want to argue and put forth evidence to
12 support the original DSP as an alternative method have
13 that right without requiring a decision of this Board
14 at this time.

15 It should be made note of here though
16 that in light of the great deal of time and effort that
17 the proponent has already spent to try and justify the
18 original DSP 15, it is probably unwarranted to spend
19 more money pursuing these issues. Certainly the
20 proponent has looked at the idea of building more major
21 supply, nuclear and fossil supply plants, in great
22 detail before removing them from the undertaking.

23 So we know it's not a matter of not
24 having the alternative looked at, or the alternative
25 method looked at, so it's not a matter of the

1 assessment not being a complete plan, but it may in
2 fact be that an intervenor sees fit to bring this as an
3 alternative method, an alternative method or
4 alternative to the 2,400 to 2,800 megawatts that are up
5 for approval before you at the end of this hearing.

6 So, in conclusion, Mr. Chairman, while
7 the impact of the Update on the scope of the hearing is
8 not complex, I don't believe. I believe the many
9 issues that have been raised by many of the intervenors
10 confuse the matter, but they go well beyond the scope
11 of the Update's impact on the hearing.

12 No doubt the Update has affected
13 allegiances among the parties. We have heard that and
14 Mr. Kelsey put that quite clearly.

15 To many, Hydro's turnaround was
16 unexpected, and as well it was a very costly one. We
17 are talking billions and billions of dollars in terms
18 of projects that are no longer on the table for a
19 approval.

20 This does not render the hearing less
21 significant or give rise to the need for a great deal
22 more evidence or funding than already committed to, nor
23 does it, Mr. Chairman, does it call for lengthy
24 adjournments or dismissal of the undertaking.

25 I would suggest, Mr. Chairman, that we

1 proceed with the hearing on the basis of the narrowed
2 undertaking before us. Important issues still need to
3 be resolved at this assessment, such as if the
4 assessment is acceptable and if Hydro should be given
5 approval for its program, or if the coming evidence
6 show better ways than Hydro's undertaking of meeting
7 the electricity needs of the province as alternative
8 methods to the undertaking put on the table.

9 To foreclose on an opportunity for
10 intervenors, Mr. Chairman, at this time to make their
11 cases, as one intervenor has suggested, that being MEA
12 in their motion that this should be a dismissal because
13 what we have heard up to now is a waste of time and
14 there is nothing to be gained by continuing, I think is
15 unacceptable, and from my earlier comments, Mr.
16 Chairman, I use that as support for that statement.

17 Thank you.

18 DR. CONNELL: Mr. Mattson, I am going to
19 try to paraphrase one of Mr. Shepherd's arguments for
20 you. This is that the language of the undertaking,
21 quoting from page 19-2, (1) the requirement and
22 rationale for the transmission facilities to
23 incorporate electricity purchased from Manitoba. As I
24 understand Mr. Shepherd, his point is that the use of
25 that language, the requirement and rationale,

1 implicitly or explicitly brings the planning process
2 and the Plan itself within the realm of the
3 undertaking.

4 Now, I take it from your own reading that
5 you disagree with that interpretation. You consider
6 the planning process and the plan to be part of the
7 assessment, but not part of the undertaking.

8 In that light, do you believe that the
9 passage I just read would mean exactly the same thing
10 if it read as follows: (1) the transmission facilities
11 to incorporate electricity purchased from Manitoba.

12 In other words, do you think the use of
13 the words the requirement and rationale are entirely
14 unnecessary and meaningless when attached to the
15 undertaking?

16 MR. MATTSON: No, Dr. Connell.

17 I believe that what Mr. Shepherd has done
18 and one of the reasons why I disagreed with his
19 submissions is that he has taken what is about to occur
20 at another hearing, another time. Hydro has come here
21 and said they were going to split everything, they are
22 first going to get the planning papers, get the
23 planning ideas on the table before you. Once that is
24 adopted, they are going to go to site-specific
25 hearings.

1 I think that when we use the words
2 requirement and rationale, that's referring to what
3 ultimately the approval is for at the end of the day
4 here with respect to the Manitoba transmission lines.
5 That's the undertaking, and that's what they are asking
6 for from this panel, is the requirement and rationale
7 for that, and that requirement and rationale flows of
8 course from the assessment before you.

9 What Mr. Shepherd, I would submit, is
10 trying to do is take the next step, the next hearing
11 and bring it into the discussion as to what is the
12 appropriate decision here at this panel. And I think
13 that the words then requirement and rationale have been
14 used by Hydro ambiguously once when referring to what
15 they are asking for in approvals here at this hearing,
16 because it is just the requirement and rationale
17 ultimately that they are going to have with respect to
18 Manitoba transmission lines, they still have to go to
19 the site-specific hearing. But then there is also the
20 requirement, the rationale, the assessment, all of the
21 material before you upon which you are to decide on the
22 undertaking, and that undertaking has been specifically
23 defined by the proponent as it must be.

24 And so intervenors can come and put forth
25 alternatives to and alternative methods, ones that the

1 proponent hasn't considered, but intervenors can't come
2 and say what the preferred undertaking is. And the
3 preferred undertaking has been defined and it is the
4 approval for that requirement and rationale of that
5 transmission line. To say otherwise would be to assume
6 that the next step, the next hearing would not be --
7 Hydro would not have to go through, that they would go
8 approval for the Manitoba transmission line here and
9 that would be it. But that's not what they are getting
10 here. There is still another whole step that they have
11 to go beyond this.

12 DR. CONNELL: So just to be specific, I
13 presume demand forecasts are part of that rationale?

14 MR. MATTSON: Are part of the assessment.
15 Certainly part of the assessment upon to decide whether
16 or not of the undertaking should be approved or not, no
17 question. Part of the plan, part of the assessment.

18 DR. CONNELL: But not part of the
19 undertaking?

20 MR. MATTSON: No, Dr. Connell.

21 DR. CONNELL: So, the use of that word
22 under the bold type caption, "The Undertaking" is, in
23 your view, quite misleading then, is it?

24 MR. MATTSON: No. Dr. Connell, what I am
25 saying is that the undertaking itself, if approved, all

1 it gives Ontario Hydro is the requirement and the
2 rationale to go to the site-specific hearing. But that
3 in no way is telling this Board what its authority is
4 with respect to deciding upon whether approvals, the
5 specific components of Hydro's undertaking should be
6 approved or not.

7 It is the requirement and the rationale
8 of the Manitoba transmission line that they are seeking
9 approval for, but to approve that you have to look at
10 the plan which is Hydro's 25-year plan, their demand/
11 supply forecasts, you have to look at the entire
12 electricity planning exercise that Hydro has gone
13 through.

14 My client is also in the position where
15 they don't think that necessarily that's an adequate
16 one upon which to base your decision at the end of the
17 day. But certainly when Hydro's is using requirement
18 and rationale of the Manitoba purchase transmission
19 lines, I think that it is clear that what they are
20 speaking about is the next step. They need another
21 approval before they can go through with that
22 undertaking. They don't have full approval yet once we
23 are finished here.

24 DR. CONNELL: Thank you.

25 THE CHAIRMAN: Thank you, Mr. Mattson.

1 We are going to take a break but let me
2 just see who we have left.

3 Mr. Castrilli?

4 MS. KLEER: I will be making submissions.

5 THE CHAIRMAN: Ms. Kleer, you will be
6 making submissions?

7 MS. KLEER: Yes.

8 THE CHAIRMAN: Is there anyone here from
9 the North Shore Tribal Council?

10 MR. DAHME: Yes, Mr. Chairman, I will be
11 very brief.

12 THE CHAIRMAN: And you can follow that
13 then, follow Ms. Kleer?

14 MR. DAHME: Yes, that's right.

15 THE CHAIRMAN: And then Mr. Colborne. Is
16 he here?

17 MR. COLBORNE: Yes. Mr. Chairman, it
18 will not be necessary for me to make any
19 representations today. Thank you.

20 THE CHAIRMAN: All right, thank you.

21 Then am I correct that the Ontario
22 Federation of Agriculture, the Ontario Natural Gas
23 Association and the Ontario Public Health Association
24 do not intend to make any submissions; is that correct?

25 MR. ROGER: Speaking on behalf of the

1 Natural Gas Association, that is correct, yes.

2 THE CHAIRMAN: And then I would think,
3 Mr. Mark, you might feel comfortable arriving on the
4 scene at that time?

5 MR. MARK: Indeed.

6 THE CHAIRMAN: And then Dr. Boldrini and
7 Mrs. Mackesy.

8 Now, is there anybody else?

9 Oh, the Government of Ontario and Mr.
10 Rosenberg.

11 Mr. Rosenberg, you can follow Mr. Mark.

12 MR. ROSENBERG: Yes.

13 THE CHAIRMAN: I take Mr. Taylor back
14 there.

15 Mr. Taylor, you can follow the North
16 Shore Tribal Council; is that satisfactory.

17 And you, sir?

18 Ken Edwards, Windsor Utilities.

19 THE CHAIRMAN: Yes. Well, we will put
20 you on after Mr. Rosenberg.

21 Have you decided you want to make some
22 submissions?

23 MR. ANSHAN: Yes, just a very brief
24 submission.

25 THE CHAIRMAN: All right.

1 And Dr. Boldrini, I have mentioned you
2 already.

3 DR. BOLDRINI: And where do you put me?

4 THE CHAIRMAN: After Mrs. Mackesy.

5 DR. BOLDRINI: I am in front of whom?

6 THE CHAIRMAN: After Mrs. Mackesy. She
7 is right behind you.

8 DR. BOLDRINI: And she will be on when?
9 This afternoon?

10 THE CHAIRMAN: I don't know if we are
11 going to make it this afternoon. The day is running
12 out, but we will have to see.

13 DR. BOLDRINI: Thank you.

14 THE CHAIRMAN: And then the Government of
15 Ontario will be last.

16 MR. KALEVAR: Kalevar, my name is
17 Kalevar, I would like to get on the list.

18 THE CHAIRMAN: Who do you represent?

19 MR. KALEVAR: Joe Citizen Kalevar.

20 THE CHAIRMAN: Will you speak with Ms.
21 Morrison during the break. Ms. Morrison is sitting
22 right there, in the purple.

23 [3:50 p.m.]

24 MR. KALEVAR: I'm only part-time
25 intervenor.

1 THE CHAIRMAN: All right. Well, she'll
2 speak to you during the break. We will take the break
3 right now.

4 THE REGISTRAR: Please come to order.
5 This hearing will adjourn for 15 minutes.

6 ---Recess at 3:51 p.m.

7 ---On resuming at 4:12 p.m.

8 THE REGISTRAR: Please come to order.
9 This hearing is again in session. Be seated, please.

10 THE CHAIRMAN: Just a moment, Ms. Kleer.
11 I just want to do a couple of administrative things.
12 The first administrative thing is that we are stopping
13 at five o'clock tonight.

14 The second administrative thing is that
15 this is the present order of presentation, as I have it
16 written down.

17 First, NAN/Treaty 3 and others
18 represented by Ms. Kleer, then the Northshore Tribal
19 Council, then the Moose River Development Area Board,
20 then the Municipal Electrical Association, then the
21 Windsor Utility Commission, then the Consumers
22 Association of Canada, then the Electrical -- well, no.

23 Mr. Anshan, who do you represent, I'm
24 sorry, I have forgotten.

25 MR. ANSHAN: Canadian Association of

1 Energy Service Companies.

2 THE CHAIRMAN: Right. Then you'll be
3 next, and then Ms. Mackesy and then Dr. Boldrini and
4 then Mr. Kalevar, and assuming -- oh, is there someone
5 here from The Voice of Women For Peace?

6 MR. D. POCH: Dr. Franklin was here
7 before, I see that she left for today, but it may be
8 that she was just assuming she wouldn't be reached in
9 time.

10 THE CHAIRMAN: All right. Well, okay.
11 And then in the wind-up spot the Government of Ontario.
12 Is there anybody who has been missed out?

13 Silence. Right.

14 Then there will be a limited opportunity
15 to reply, going back up the reverse order. I would
16 hope people would restrain themselves, we don't want to
17 hear the arguments over again, but we will go back up
18 the order, if I can remember it, and give people an
19 opportunity to reply, winding up with Hydro, as has
20 been customary at these hearings, having the last
21 formal word and then we will adjourn to consider our
22 decision.

23 All right. Ms. Kleer.

24 SUBMISSIONS BY MS. KLEER:

25 Thank you, Mr. Chairman. I think it's

1 best to begin with what's clear and from there I'll
2 - move into the murky quite rapidly, I'm sure.

3 What is clear, I submit, is that the
4 proponent may define its undertaking however it wishes
5 to do so. Attempts to redefine the undertaking, as
6 seen for example in AMPCO's submissions are, we submit,
7 inconsistent with that fact.

8 Our submissions are intended to clarify
9 what we believe the proponent has put forward as its
10 undertaking.

11 Ontario Hydro has said very clearly in
12 Chapter 19 that its undertaking is a program in respect
13 of certain activities associated with meeting future
14 electricity requirements, and I don't want to turn to
15 page 19-1, we have looked at it a number of times.
16 Both paragraphs in the second column there adequately
17 explain what the undertaking is, or at least begin to
18 explain it.

19 The undertaking is not and never was the
20 Demand/Supply Plan, whether it be updated or not. I
21 think that's simply clear when you read Chapter 19-1,
22 nor is the undertaking the activities themselves, and I
23 think that's been made very clear in Panels 6 and 7.
24 Ontario Hydro is not seeking approval for specific
25 sites or for a specific route for transmission lines.

1 In our submission the undertaking cannot
2 be anything beyond the program of activities that are
3 the subject of the approvals that are now being sought
4 by Ontario Hydro as set out in Exhibit 452.

5 I was going to read from the Southwestern
6 Ontario case that was referred to at page 2 of the OPHA
7 submissions that indicate that the undertaking can
8 change somewhat, but that's already been done, so I
9 won't refer to that. But, in our submission, although
10 the undertaking has changed, it has not changed
11 substantially so that we cannot continue to proceed
12 with this hearing.

13 In support of our submission on what the
14 undertaking is, I think it's critical that we look at
15 Section 12(2) of the Environmental Assessment Act. On
16 the wording of Section 12, the environmental assessment
17 in relation to the undertaking can cover many more
18 matters than the undertaking for which the approval is
19 being sought, and I believe Mr. Mattson has discussed
20 this at some length.

21 The wording of clause 12(2)(d) which
22 talks about giving approval or not giving approval to
23 proceed with the undertaking in respect of which the EA
24 was submitted, can only be interpreted to say that the
25 Board can provide approvals only to proceed or not

1 proceed with the undertaking or parts thereof subject
2 of course to terms and conditions.

3 Approvals cannot be in relation to
4 matters outside the undertaking, likewise terms and
5 conditions can only relate to the undertaking and,
6 therefore, when no approvals are now requested by
7 Ontario Hydro in relation to fossil and nuclear, the
8 Board cannot stipulate any terms and conditions which
9 would apply to either of those options.

10 We also submit that the undertaking does
11 not include the planning methodology, and I would refer
12 you to CEG's submissions on this, and I don't intend to
13 repeat them, other than to say, again, that the
14 planning methodology is clearly very relevant, it's up
15 for consideration, the Board will have to make findings
16 about it, but the Board will not have to approve it.

17 If Ontario Hydro's planning methodology
18 does not make sense in the Board's findings, then
19 either the Board can say that the requirement and
20 rationale for the undertaking has not been established,
21 or it could prefer another intervenor's methodology
22 that may or may not provide the necessary requirement
23 and rationale for the components of the undertaking
24 that, again, Ontario Hydro has itself defined.

25 Giving legal approvals to the methodology

1 for planning would, we submit, lead to absurd results.
2 For instance, if it was discovered that the methodology
3 for avoided cost should be improved by internalizing
4 externalities - let's say in five years things had
5 progressed to that stage, I'm not saying -- that's not
6 necessarily that we can do it now, but let's say the
7 Board found at this point it wasn't appropriate, then
8 in five years that changed - what would have happened
9 is that Ontario Hydro would have to come back to
10 another Board to seek other sets of approvals if you
11 approve that methodology because they would be going
12 for another methodology.

13 Now, I referred at paragraph 13 of our
14 submissions to the Class Environmental Assessment on
15 Timber Management Planning, I don't intend to go
16 through it in great detail, but I think what's clear is
17 that this hearing is not a Class EA, it is not intended
18 that this Board prescribe guidelines for how to develop
19 the next Demand/Supply Plan or how it should do its
20 planning for the next 25 years although, of course, the
21 Board could find that Ontario Hydro should have, in
22 preparing the Plan, followed certain guidelines and
23 principles.

24 To summarize then, in our submission, the
25 undertaking is not the Demand/Supply Plan, it does not

1 include the planning methodology which has resulted in
2 the specification of the undertaking, it is not the
3 activities themselves, in essence, it is a program in
4 respect of certain activities.

5 To try and understand what program means,
6 we looked at the Shorter Oxford English dictionary and
7 I refer to an alternative definition of program in the
8 Shorter Oxford English Dictionary that says:.

9 "A program is a definite plan of any
10 intended proceedings."

11 This definition is the one that would
12 seem to fit best with Ontario Hydro's view of the
13 undertaking. Given this definition, I submit that the
14 program for which OH is now seeking approval is the
15 program of specific activities including the carrying
16 out of the necessary studies and the right to proceed
17 to an environmental assessment hearing in relation to
18 those specific activities and the specific activities
19 are hydraulic that add up to 1,400 to 1,800 megawatts
20 and transmission to incorporate power purchased from
21 Manitoba pursuant to the 1989 contract for 1,000
22 megawatts.

23 Once it's clear that the undertaking is a
24 program in respect of specific activities, the
25 approvals which may be granted or may not be granted or

1 may be granted with terms and conditions become
2 relatively easy to understand.

3 As Section 12(1)(d) and (e) of the
4 Environmental Assessment Act provide, the Board can
5 give approvals as to whether to proceed with the
6 undertaking or not.

7 As stated in our submissions, if you
8 envision the undertaking as a circle, the Board can
9 only grant approvals about what is inside that circle.
10 We fundamentally disagree with the Canadian Nuclear
11 Association submissions on this. In our opinion the
12 approvals requested are co-extensive with the
13 undertaking and, for that, we rely upon Section
14 12(2)(d) of the Environmental Assessment Act.

15 What is also important to note in our
16 submission is that the Board cannot grant approvals for
17 the requirement and rationale for the undertaking even
18 though Ontario Hydro is requesting the Board to do so.
19 The Board must consider the requirement and rationale
20 in order to decide whether to accept, or amend and
21 accept the environmental assessment as it's required to
22 do under Section 12(2)(c).

23 Having considered the requirement and
24 rationale, the Board can then decide if it accepts them
25 as supporting the requests for approvals to proceed

1 with the program. To put it another way: The onus on
2 Ontario Hydro at this hearing is to establish the
3 requirement and rationale for the specific activities
4 which I've just mentioned, but the Board cannot approve
5 the requirement and rationale.

6 If Ontario Hydro fails to meet the onus
7 of establishing the requirement and rationale in
8 respect of each component of the undertaking, no
9 approvals in respect of the particular components can
10 be given.

11 Simply on a plain reading of Section
12 12(2)(d) the Board's cannot give approval for
13 requirement and rationale. You are allowed to give
14 approvals to proceed with an undertaking, it defies
15 reason to talk about proceeding with a requirement and
16 rationale.

17 What flows from the fact that Ontario
18 Hydro cannot get legal approval for the requirement and
19 rationale for the specific components of the
20 undertaking is that at the next level of hearing, the
21 site-specific level, Ontario Hydro will have to go
22 through another gate, a second requirement and
23 rationale gate, if you will.

24 At site-specific hearings on hydraulic,
25 for example, the onus will be on Ontario Hydro to

1 demonstrate that there is a site-specific requirement
2 and rationale that a particular site should be part of
3 the 1,400 to 1,800 megawatts or whatever amount of
4 capacity, if any, the Board were to approve at this
5 hearing.

6 As noted at paragraph 24 of our
7 submissions, we submit that approving requirement and
8 rationale does not fit in with the scheme of the
9 Environmental Assessment Act. Section (5)(3) says that
10 an EA must include a statement of the rationale for the
11 undertaking. Nothing in the Act permits Ontario Hydro
12 to get a phased approval for the undertaking that would
13 consist of satisfying the onus to establish the
14 rationale at one hearing and then satisfy the rest of
15 the requirements of Section 5(3) at a second hearing.

16 This does not mean, in our submission,
17 that the site-specific rationale that Ontario Hydro
18 will have to establish at some later hearing is going
19 to involve a reiteration of the exercise of comparing
20 demand and supply options that's taking place at this
21 hearing - that's what this hearing is about - but, in
22 our submission, Ontario Hydro cannot come away from
23 this hearing having compared demand and supply options
24 over the course of this hearing with approvals that
25 last for ever, or for some very long period of time.

1 Any approvals from this hearing must be
2 time limited, and the reason for that time limitation
3 is, we think, abundantly clear from the course of
4 events at this hearing. Demand management and NUGS
5 have changed the face of this hearing in the course of
6 less than two years and there's every reason to
7 believe - and I'm sure it will be argued strenuously by
8 other intervenors - that this trend will only continue.

9 As well, other alternative energy supply
10 options now deemed uneconomic could well become
11 economic in the very near future, especially if the
12 definition of economic comes to include a
13 quantification of external costs.

14 We suggested in paragraph 27 of our
15 submissions that the approvals should be time limited
16 to three years with a built-in review process that
17 would be established by terms and conditions. We would
18 suggest that this should be an intermediate process
19 that would only be gone through if approvals were not
20 acted upon.

21 In our view, the approvals cannot in any
22 event last longer than five years from December 31,
23 1991 which is the date specified in Chapter 18 that
24 deals with action plans. Ontario Hydro has structured
25 its case to seek approvals in respect of activities

1 contained in its action plan as set out in Chapter 18.

2 I will move now briefly to a discussion
3 of the issues which we believe that the Board should
4 give consideration to. I am not going to go through
5 them in detail, we have set them out at pages 4 and 5
6 of our submissions, but I want to make it clear that
7 the reason we set those out is because we want to get
8 some understanding from the Board as to what issues are
9 appropriate for a plan level hearing as opposed to a
10 site-specific hearing.

11 The first issue is, is the planning
12 methodology used by Ontario Hydro which led to its
13 submission of the undertaking adequate to support the
14 approvals requested. And one of the items that we
15 believe that the Board must consider that hasn't been
16 discussed by any of the other parties is whether or not
17 Ontario Hydro's public consultation approach used to
18 derive its demand/supply planning strategy is adequate
19 for the purposes for which Ontario Hydro used it.

20 For example, was Ontario Hydro's public
21 consultation approach adequate to allow it to develop
22 the natural and social and environmental criteria that
23 it used in Exhibit 4 to evaluate the various options.
24 That's just one of the issues that we think is relevant
25 to the question of the planning methodology.

1 Our second point, point B, which we
2 believe is central to the Board's consideration,
3 relates to the adequacy of the description of the
4 environment and the adequacy of their description of
5 the expected impacts.

6 In this regard, I want to point out that
7 we requested at the bottom of page 4 of our submission
8 that Ontario Hydro should be ordered to file - this is
9 a process matter that I would like to raise - Ontario
10 Hydro should be ordered to file well in advance of the
11 commencement of Panel 10, its analysis of the
12 advantages and disadvantages to the environment of the
13 undertaking, which we submit has changed, the
14 alternative methods of carrying it out, and the
15 alternatives to the undertaking. Because approvals
16 have been scaled down, we believe Ontario Hydro has to
17 provide this revised analysis.

18 THE CHAIRMAN: I'm not quite sure I
19 understand what you mean by that. Wouldn't they say in
20 response to that, well it's already included in what we
21 have already filed?

22 MS. KLEER: I understand your point, but
23 it appears that the undertaking has changed.

24 THE CHAIRMAN: It has changed but as most
25 people have said today, and perhaps you don't agree

1 with it, it has shrunk, it hasn't expanded. I would
2 see the merit of the argument if there had been an
3 expansion but it shrunk.

4 MS. KLEER: I agree that it has shrunk,
5 but now that their analysis was based upon a full range
6 of options, they now have to justify the limited range
7 of options, they have to analyze it in light of Section
8 5(3), the requirements of Section 5(3).

9 THE CHAIRMAN: I don't quarrel with that,
10 I just thought what you were asking was to do an
11 environmental analysis, and I just wondered whether
12 their answer wouldn't be: Well, we have done that
13 already.

14 MS. KLEER: Well, we submit that --

15 THE CHAIRMAN: I mean, they've done it
16 for everything they are asking approvals for.

17 MS. KLEER: I appreciate that.

18 THE CHAIRMAN: They may not have done a
19 very good job, but they have done it.

20 MS. KLEER: But since the undertaking has
21 changed, one also has to get to the point of comparing
22 the advantages and disadvantages of the undertaking,
23 the alternative methods, the alternatives to. If the
24 undertaking has changed, surely the alternatives to the
25 undertaking have changed.

1 THE CHAIRMAN: Well, all right. Well,
2 perhaps I had the impression -- try and raise the
3 issues that Hydro might want to raise, but I guess that
4 we'll leave it at that for the moment.

5 But all the options, the components,
6 whatever language you use, have been environmentally
7 analyzed by Hydro. Now they are not all part of the
8 program, but they have all been analyzed.

9 MS. KLEER: I appreciate that but Section
10 5(3), I think it's (d) requires that there be a
11 comparison of the advantages and disadvantages of the
12 alternatives to. If your alternatives to have
13 changed - nuclear, fossil are now alternatives to in
14 our submission - then you have a recomparison or a
15 different comparison of the advantages and
16 disadvantages because they were formally not
17 alternatives to, they were part of the undertaking.

18 THE CHAIRMAN: But that hasn't changed
19 their spots, like the leopard, they still have the same
20 characteristics.

21 MS. KLEER: That's fair.

22 THE CHAIRMAN: I think I better leave it
23 at that and let the proponent deal with it.

24 MS. KLEER: All right. I just have a few
25 more points to make here.

1 One of the other issues that we believe
2 the Board has to consider is whether Ontario Hydro's
3 description of the actions necessary or reasonably
4 necessary, or reasonably expected to be necessary to
5 prevent, change, mitigate or remedy the predicted
6 environmental effects are sufficient to support
7 conclusions about its ability to mitigate.

8 And in relation to the issue of
9 mitigation, we suggest that our Item (c) is an issue
10 that this Board must consider. I want to refer briefly
11 to what was stated by Mr. Bancroft-Wilson in Panel 7
12 where he concluded his evidence on natural
13 environmental impacts and mitigation by giving a
14 variety of reasons to support his conclusion that the
15 characteristics of transmission facilities are such
16 that environmentally acceptable transmission facilities
17 required to incorporate these supply resources can be
18 planned and submitted for review under the
19 Environmental Assessment Act.

20 The reasons for his conclusion included a
21 number of things, planning flexibility, the experience
22 they have had on a number of transmission studies,
23 public consultation, and experience with construction
24 technology and impact management measures.

25 The Board is going to have to consider

1 whether their conclusion is borne out by the evidence.
2 - In so doing, if intervenors were to bring forward
3 representative area or evidence -- by example, evidence
4 from northern Ontario to test Ontario Hydro's
5 conclusion, the Board will have to decide in light of
6 all of the evidence whether Ontario Hydro's approach
7 prevention and mitigation is sufficient to permit the
8 Board to grant the approval for Ontario Hydro to
9 proceed with its program of activities in relation to
10 planning for transmission.

11 At page 5 of our submission in the third
12 paragraph we have requested specific direction from the
13 Board on this matter so that we can proceed in
14 preparing our cases; in other words, we want to know
15 whether the evidence by example approach is one that
16 this Board thinks is appropriate to test the
17 conclusions that Ontario Hydro has made about
18 mitigation.

19 [4:30 p.m.]

20 Our fourth issue is: Has Ontario Hydro
21 established the need for the Manitoba Purchase in light
22 of the changes summarized in the DSP update, Exhibit
23 452.

24 In this regard I would like to briefly
25 refer to Interrogatory 11.26.7. I have given a copy of

1 that to the Registrar. It has not been filed yet. I
2 would suggest it be given an exhibit number since we
3 haven't yet opened a number up for the Panel 11
4 interrogatories, I don't know how you want to deal with
5 that.

6 THE REGISTRAR: 517.

7 THE CHAIRMAN: Fine, we can do it that
8 way.

9 ---EXHIBIT NO. 517: Interrogatory No. 11.26.7.

10 MS. KLEER: In interrogatory 11.26.7
11 which we received from Ontario Hydro on February 13
12 after the completion of Panel 7, we asked, in relation
13 to the statement at page 4-1 of Exhibit 4, the
14 environmental analysis, that successful demand
15 management programs may defer the need for additional
16 new supply, we asked:

17 Please indicate how successful demand
18 management programs may defer the need
19 for the additional new supply provided by
20 the Manitoba Purchase.

21 Ontario Hydro answered that:

22 Meeting or exceeding demand management
23 targets would not defer the Manitoba
24 Purchase as Ontario Hydro has signed a
25 contract making a commitment to purchase

1 power beginning November 1998 at 200
2 megawatts and increasing to 1,000
3 megawatts by 2004.

4 I think the 2004 is a typo, it would have
5 to be 2014.

6 But with respect, I think Ontario
7 Hydro's --

8 THE CHAIRMAN: No, I think it is 2004.

9 MR. B. CAMPBELL: No, no.

10 MS. KLEER: Pardon me, 2004.

11 I would submit that Ontario Hydro's
12 answer is unacceptable. The Board has to consider
13 having regard to the economics of the Manitoba Purchase
14 contract and to the ability of demand management and
15 NUGs to push back the need for the Manitoba Purchase,
16 whether approval to proceed with planning for
17 transmission to incorporate the Manitoba Purchase
18 should be given.

19 If the Board disagrees with that view,
20 then I submit Ontario Hydro will have found a very neat
21 way of getting around establishing the requirement for
22 transmission to incorporate the Manitoba Purchase; that
23 is, by entering into a contract and saying the deed is
24 done.

25 So again, I ask that one of the issues

1 that the Board agrees to be considered is whether
2 Ontario Hydro has established the need for the Manitoba
3 Purchase in light of the changes summarized in the
4 Update.

5 There are two further issues that are
6 set out at page 5 of our submissions, items D and E,
7 and I have nothing further to comment on those. So
8 those are my submissions.

9 THE CHAIRMAN: Thank you, Ms. Kleer.

10 North Shore Tribal Council?

11 MR. DAHME: The name, Mr. Chairman, is
12 Dahme, D-A-H-M-E, initial H.

13 SUBMISSIONS BY MR. DAHME:

14 There are only two items that I would
15 like to address, and they have in part been addressed
16 by the others parties, and I would just like to lend my
17 voice to those.

18 The first is: Has there been a
19 fundamental change in the undertaking?

20 We accept that what is required if the
21 MEA is to succeed in its motion is a substantial or
22 fundamental change in the undertaking. The short
23 answer to that is that there has not been that kind of
24 change, and subsequently MEA should not be successful
25 in its motion.

1 The second issue relates to what happens
2 in respect of the nuclear and fossil fuel options. The
3 short submission in that regard is that we believe that
4 those should be treated as alternatives to.

5 According to the Eastern Ontario Hydro
6 decision, this panel will have no jurisdiction to
7 approve those alternatives as a consequence.

8 In the alternative to that submission we
9 would submit that if they are considered as alternative
10 methods, then there certainly has not been the kind of
11 evidence introduced to allow this Board to approve
12 those alternatives, and that it would then lie with
13 other intervenors to provide the kind of evidence that
14 would have to be provided by a proponent to even put
15 before the Board the possibility of approving those
16 alternatives.

17 In short, those alternatives, in our
18 view, are off the table.

19 Those are all my submissions, Mr.
20 Chairman.

21 THE CHAIRMAN: Mr. Taylor?

22 MR. TAYLOR: Thank you, Mr. Chairman. On
23 behalf of Moosonee, I will attempt to be as brief as
24 possible.

1 SUBMISSIONS BY MR. TAYLOR:

2 First, we would respectfully submit that
3 the hearing should continue for the reasons that have
4 been outlined, but that the undertaking hasn't
5 substantially changed while the program of activities
6 has certainly been narrowed.

7 Secondly, however, there are some
8 procedural matters we believe require to be addressed.

9 First, as has been indicated by others,
10 Moosonee requires the background data, the reports, et
11 cetera, that have been consistently requested by other
12 intervenors.

13 Secondly, where the Update has affected
14 the evidence in other panels, those panels should be
15 revisited, including the process of the
16 interrogatories. And, for example, Mr. Chairman, we
17 would cite Panel No. 6, the hydraulic panel, whereas
18 the Update calls for the potential creation of a
19 surplus of power during a period of time and has a
20 discussion as to the management of that surplus,
21 Moosonee requests the opportunity to be able to
22 cross-examine on this new information that has come out
23 subsequent to the completion of our cross-examination
24 of Panel No. 6.

25 These items, the availability of

1 documentation, the supplementary interrogatories based
2 on information that has come subsequent to that time,
3 and the reopening of panels, these all require the
4 availability of additional time, and that's a matter I
5 am sure the Board will take into account.

6 Finally, our final point is that we look
7 forward to the opportunity at the appropriate time to
8 deal with the issues of costs and supplementary
9 funding.

10 Those are our submissions at this time,
11 Mr. Chairman.

12 THE CHAIRMAN: Thank you, Mr. Taylor.

13 Mr. Mark?

14 MR. MARK: Thank you, Mr. Chairman.

15 SUBMISSIONS BY MR. MARK:

16 After listening to a day of submissions
17 on the meaning of the undertaking and how it's defined,
18 I was for a time, I must say, confused myself.

19 I think at the beginning it's wise to
20 bear in mind not in the context of levity, Mr.
21 Chairman, but in the context of a serious consideration
22 of this question what Mr. Kelsey had to say, and while
23 he stated it well and it certainly was humorous, I
24 don't think the facts should be lost upon you that we
25 are here asking whether there has been a significant

1 change in something which has caused so much confusion,
2 and which has caused the parties to change rather
3 drastically and dramatically their positions on what
4 the hearing is all about and what is up for
5 consideration.

6 I find it rather difficult, after
7 listening to the submissions today that anybody could
8 come to any conclusion but that. The Update document
9 presented by Ontario Hydro has truly fundamentally
10 changed what it is we are doing here, and that's been
11 reflected in many of the submissions.

12 While some people, few people I note say
13 that there has been no significant change, by and large
14 what you have heard today from intervenors on all sides
15 of the fence - and Lord knows there is more than two
16 sides to the fence after today - intervenors on all
17 sides of the fence saying that there have been changes.
18 The strategy as changed, the time frame has changed,
19 the composition has changed, so many things have
20 changed. And they talk about the approvals change
21 which results from those, they talk about the scope of
22 the hearing change which result from those, they talk
23 about the procedural changes that may result from
24 those.

25 What scarce few people have addressed,

1 Mr. Chairman, in my submission, is the more basic issue
2 which is the jurisdictional one, and that is: Does it
3 affect the ability of this Board to continue with the
4 hearing.

5 In my submission, Mr. Chairman, the Board
6 cannot continue with the hearing.

7 Firstly, the undertaking as submitted has
8 changed, and this Board's jurisdiction extends only to
9 consideration of the undertaking in respect of which
10 the environmental assessment was submitted.

11 Secondly, Mr. Chairman, that the public
12 notice which this Board issued with respect to this
13 hearing, while it perhaps could have been, if my
14 friends are right, as to the scope of the undertaking,
15 while it perhaps could have been worded more broadly,
16 is rather specific in my submission as to the matter,
17 the undertaking and the contents and composition of the
18 undertaking which this Board was going to consider in
19 this hearing. And that the undertaking as now proposed
20 by Ontario Hydro is so substantially different from
21 that described in this Board's only notice, that the
22 Board can't continue without starting that process
23 afresh.

24 THE CHAIRMAN: Take me to the notice, if
25 you would, and just show me where it describes the

1 undertaking.

2 MR. MARK: We can start, Mr. Chairman --

3 THE CHAIRMAN: I think that's what you
4 said, wasn't it, that the notice describes the
5 undertaking?

6 MR. MARK: Yes. I was going to come to
7 this later, but let me just jump ahead to answer your
8 question. It does two things, Mr. Chairman. I think
9 it makes it clear, in my submission, that the notion
10 that the undertaking can be defined so broadly as to be
11 any plan for meeting future requirement, I think it
12 answers that contention. And it also sets out rather
13 specifically what it consists of.

14 If we look at the first paragraph under
15 the words "Notice of Public Hearing", it says:

16 Take notice that a public hearing will
17 be held to consider Ontario Hydro's
18 proposed program for meeting future
19 electricity requirements in Ontario.

20 Ontario Hydro's proposed program. Now,
21 we have heard a lot of semantics today, Mr. Chairman,
22 reading those words I can't conceive that you would
23 expect any reasonable member of the public to consider
24 that that means other than the program of activities in
25 respect of which the approvals have been sought by

1 Ontario Hydro.

2 Later in this document, the notice, we
3 get down to under environmental assessment. Ontario
4 Hydro has published a demand/supply plan report setting
5 out proposals to ensure that a continuing reliable
6 electricity supply is provided in Ontario. And then
7 there is a description: Each alternative Demand/Supply
8 Plan includes... and there is a rather detailed
9 description of all the components.

10 In my submission, Mr. Chairman, and I
11 will come back to this in greater detail later, those
12 together constitute, in my submission, a notice to the
13 public that what is being considered is Ontario Hydro's
14 proposal for those facilities for meeting the future
15 need. And after you have heard my submissions on what
16 it is that Ontario Hydro now proposes, I hope to
17 persuade you, Mr. Chairman, that this notice is no
18 longer adequate in terms of fairly alerting the members
19 of the public to precisely what it is even in somewhat
20 general terms that Ontario Hydro proposes to do about
21 its stated objective of meeting long-term future
22 electricity requirements.

23 Mr. Chairman, I agree that I don't think
24 there is much to be gained in going through a semantic
25 exercise and dictionary definitions of the word

1 undertaking. It is obviously on its face a word which
2 is susceptible to many interpretations.

3 In my submission, the appropriate
4 starting point for the analysis of what the undertaking
5 is and how this Board should go about assessing what it
6 is that Ontario Hydro has done as reflected in Exhibit
7 452 is to go back to the purpose of the Environmental
8 Assessment Act.

9 I don't think there is anybody here, Mr.
10 Chairman, who has studied the history of the Act, who
11 would dispute the proposition that the purpose of the
12 legislation was to promote and foster proper planning.
13 That's the object of the exercise.

14 The Act is clearly structured in such a
15 way as to ensure that proposals by institutions such as
16 Ontario Hydro, before they come before any authority
17 for approval, have gone through a process of study,
18 consideration, public consultation, all in a systematic
19 way in order to ensure that a systematic planning
20 process has been brought to bear.

21 [4:48 p.m.]

22 So when the Update was published, Mr.
23 Chairman, the MEA asked itself the question: How does
24 it shape up compared with that purpose of the
25 legislation.

1 The conclusion, Mr. Chairman, that the
2 MEA comes to, regrettably but inevitably is, firstly,
3 that in terms of utility planning, which is the
4 exercise we are engaged in at the end of the day, this
5 is an entirely different plan and undertaking; and,
6 secondly, that the Update is manifestly not the result
7 of any type of rationale or systemic planning process
8 which the legislature intended be applied to
9 undertakings brought forward for approval.

10 On the jurisdictional question, Mr.
11 Chairman, the starting point must be Section 12 of the
12 Act. Section 12(2)(d) of the Act, to which you've been
13 referred before, is of course critical. And this
14 deals, I think it's fair to say, Mr. Chairman, with the
15 jurisdiction of this Board, and this is what was
16 referred to you by the Minister, is:

17 "Whether approval to proceed with
18 the undertaking in respect of which the
19 environmental assessment was submitted
20 should or should not be given."

21 And I say to you, Mr. Chairman, that
22 unless you can come to the conclusion that this is
23 still the undertaking in respect of which the
24 environmental assessment was submitted, you have no
25 jurisdiction to proceed with the consideration of

1 Exhibit 452.

2 There is, I think as you noted earlier,
3 Mr. Chairman, no provision in the legislation which
4 permits the proponent in the course of this hearing to
5 submit for your consideration a different undertaking.

6 Now, nobody is standing before you, least
7 of all myself, Mr. Chairman, today saying that every
8 detail and every element of an undertaking is written
9 in stone down to the nuts and the bolts. Clearly
10 that's nobody's submission and, indeed, Hydro itself
11 initially, quite properly, crafted a plan which had
12 within it, and in respect of which they sought your
13 approval, mechanisms for flexibility to deal with
14 changing conditions.

15 But, in our submission, this legislation
16 does not permit the proponent to substantially change
17 the undertaking to the point where it is a different
18 undertaking.

19 And if it's not a different undertaking,
20 Mr. Chairman, I say that the hearing cannot proceed in
21 any event because then manifestly, in my submission,
22 Ontario Hydro has not complied with the clear
23 requirement of the Act to submit an environmental
24 assessment. I think frankly Ontario Hydro can't
25 proceed either way.

1 If it's not a new undertaking, then it
2 must be either an alternative to the undertaking or, as
3 I think Hydro says it is, it's an alternative method of
4 carrying out the undertaking. It's beyond question
5 that the Act mandates that they submit an environmental
6 assessment with respect to that and my submission is -
7 as I'll come to in detail later - they haven't done it.

8 So in the result, whether it's a new
9 undertaking or whether it's an alternative method of
10 carrying out the undertaking, Ontario Hydro cannot
11 proceed with Exhibit 452 and this hearing either way.

12 Mr. Chairman, let me deal in detail first
13 with the question of what is the undertaking. As I
14 indicated to you before, I think it is pointless to try
15 and play semantics with the simple word undertaking out
16 of context, but Ontario Hydro has defined the
17 undertaking - and I don't dispute that Ontario Hydro is
18 entitled to define the undertaking.

19 As I took Mr. Howard's comments from
20 earlier today he was suggesting, again if I understand
21 him correctly, that Ontario Hydro is saying that the
22 undertaking consists of any plan or program, or a plan
23 or program to meet future need, regardless of the
24 precise contents of it. And I've understood other
25 intervenors to be saying that what is the undertaking

1 is some ephemeral notion of a plan or a program and, so
2 long as there is any plan or program, the contents of
3 it can be changed without care for whether or not this
4 Board retains its jurisdiction.

5 I submit, Mr. Chairman, not only
6 logically does that not make much sense, but Ontario
7 Hydro has not defined the undertaking that way.
8 Ontario Hydro has specifically said that its
9 undertaking, as it defines it, consists of a particular
10 plan having particular components.

11 You, Mr. Chairman, were referring earlier
12 to page 19-1. I would like to take you, Mr. Chairman,
13 to page 1-3 of Exhibit 3, the right-hand most column,
14 and I'll take the liberty of reading the entire column:

15 "Ontario's Environmental Assessment
16 legislation is designed to encourage good
17 planning and informed decision-making.
18 The Environmental Assessment Act sets out
19 a variety of requirements to assist in
20 achieving these objectives. In general
21 terms they include consideration of
22 alternatives and the identification and
23 evaluation of the effects, advantages and
24 disadvantages of the proposals submitted
25 for approval and its alternatives. Under

1 the Act specific matters, those for which
2 approval is requested and required, are
3 identified as the undertaking. The
4 undertaking as described in this
5 Environmental Assessment Document is made
6 up of specific demand/supply components
7 and constitutes a program in respect of
8 activities associated with meeting future
9 electricity requirements."

10 Mr. Chairman, we don't have to read it
11 more than once, in my respectful submission, to come to
12 the clear conclusion that the undertaking as defined by
13 Hydro is not some ephemeral concept of any plan or of
14 doing anything to meet the future needs and
15 requirements, it is the plan, it is the proposal which
16 is put before you in terms of the approvals sought.

17 And, Mr. Chairman, Ontario Hydro's
18 submission, I think, boils down to a suggestion to you
19 that they want the undertaking to be described in terms
20 of its purpose. They want to say, as long as we bring
21 forward a plan which has as its objective the meeting
22 of the future electricity requirements, we can from
23 time to time shape it and describe it as we will.

24 But the Act itself, Mr. Chairman, also
25 makes it clear that the undertaking itself is distinct

1 from the purpose of the undertaking. In Section 5 of
2 the Act, which deals with the contents of the
3 Environmental Assessment, 5(3) of the Act says:

4 "An environmental assessment
5 submitted to the Minister pursuant to
6 subsection (1) shall consist of:

7 (a) a description of the purpose of the
8 undertaking."

9 From that, Mr. Chairman, in my submission
10 it's axiomatic that the purpose is quite distinct from
11 the undertaking itself.

12 To the other extreme there are some
13 intervenors who argue that the plan or the undertaking,
14 while consisting of some concrete elements, consists
15 only of the particular facilities and that the planning
16 methodology or rationale which underlie it play no part
17 in the definition of the undertaking.

18 In my submission, Mr. Chairman, that is
19 also incorrect. The undertaking consists of the
20 specific approvals sought and the methodology by which
21 the preferred approvals come before you. And, again,
22 this is not a definition based on semantics, it is
23 based on Ontario Hydro's own definition of the
24 undertaking.

25 I think, Mr. Chairman, it's wise to

1 recall the background to this. Before this hearing got
2 underway, indeed even before the Demand/Supply Plan
3 Report, which is Exhibit 3, was written Ontario Hydro
4 went through several years of the Demand/Supply Option
5 Study and the Demand/Supply Planning Study and came up
6 with the Demand/Supply Planning Strategy, that whole
7 series and many years of consultations to come up with
8 the strategy predated the report, and Ontario Hydro has
9 made it clear that the rationale, the planning
10 strategies which resulted from those processes are part
11 and parcel of the undertaking it has put before you
12 today, or at least what it put before you in December
13 of 1989.

14 If we look at Chapter 19, Mr. Chairman,
15 page 19-1 of Exhibit 3, we can start -- indeed even at
16 the bold type preamble at the top of the page, it says:

17 "The three candidate Demand/Supply
18 Plans are designed to meet these
19 electricity needs in accordance with
20 approved planning criteria."

21 Those criteria, Mr. Chairman, of course,
22 refer to Ontario Hydro's corporately approved planning
23 criteria.

24 Further down the page, first column under
25 the heading General Purpose:

1 "The general purpose of the program
2 is to ensure that a continuing reliable
3 electricity supply is provided in Ontario
4 in a manner consistent with the Demand/
5 Supply Planning Strategy approved by
6 Ontario Hydro's Board of Directors in
7 March, 1989."

8 Now, Ontario Hydro was always at liberty
9 to say the purpose of the undertaking is to meet future
10 needs and present to this Board for its consideration
11 the alternative planning methodologies to get there.

12 It didn't do that, rather it, itself,
13 defined the undertaking as being fulfillment of the
14 Demand/Supply Planning Strategies which we have
15 reflected in the appendix to the document.

16 Mr. Chairman, my next step is to actually
17 go to those strategies. I see it's five o'clock on the
18 nose. Perhaps it's a convenient time to break.

19 THE CHAIRMAN: I'm sorry to interrupt you
20 in the middle of your argument. We do have to stop at
21 five. So we can start again tomorrow morning at ten.

22 THE REGISTRAR: This hearing is adjourned
23 until ten o'clock tomorrow morning.

24 ---Whereupon the hearing was adjourned at 5:00 p.m.
25 to be reconvened at ten o'clock on Tuesday, March
 10th, 1992.



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